No. 15-1406
Title: The Goodyear Tire & Rubber Company, Petitioner
v.
Leroy Haeger, et al.
Docketed: May 19, 2016
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (12-17718, 13-16801, 13-16861, 13-16862)
Decision Date: February 16, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 16 2016	Petition for a writ of certiorari filed. (Response due June 20, 2016)
Jun 16 2016	Waiver of right of respondents Graeme Hancock & Fennemore Craig, P. C. to respond filed.
Jun 20 2016	Brief of respondents Leroy Haeger, et al. in opposition filed.
Jun 30 2016	Reply of petitioner The Goodyear Tire & Rubber Company filed.
Jul 27 2016	DISTRIBUTED for Conference of September 26, 2016.
Sep 29 2016	Petition GRANTED limited to Question 1 presented by the petition. The petition for a writ of certiorari in No. 15-1491 is granted limited to Question 1 presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument.
Nov 14 2016	Joint appendix filed. (Statement of costs filed.)
Nov 14 2016	Brief of petitioner The Goodyear Tire & Rubber Company filed.
Nov 21 2016	Brief amicus curiae of American Bar Association filed.
Nov 21 2016	Brief amicus curiae of National Association of Manufacturers filed.
Dec 5 2016	SET FOR ARGUMENT on Tuesday, January 10, 2017.
Dec 7 2016	Record requested from the U.S.C.A. 9th Circuit.
Dec 12 2016	CIRCULATED.
Dec 12 2016	Record received from U.S.C.A. 9th Circuit is electronic.
Dec 14 2016	Brief of respondents Leroy Haeger, et al. filed. (Distributed).
Jan 3 2017	Reply of petitioner The Goodyear Tire & Rubber Company filed. (Distributed)
Jan 10 2017	Argued. For petitioner: Pierre H. Bergeron, Washington, D. C. For respondents: John J. Egbert, Phoenix, Ariz.
Jan 17 2017	Record received from the U.S.D.C. for the District of Arizona (Phoenix) (1 box).
Apr 18 2017	Judgment REVERSED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which all other Members joined, except Gorsuch, J., who took no part in the consideration or decision of the case.
May 22 2017	JUDGMENT ISSUED.

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RECORD AND BRIEFS

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No. ____

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER; DONNA HAEGER; BARRY HAEGER; SUZANNE HAEGER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In *Int'l Union v. Bagwell*, 512 U.S. 821 (1994), this Court ruled that sanctioned parties must be afforded the protections of criminal due process where sanctions are punitive, but not where they are compensatory. In this case, in a divided decision, the Ninth Circuit affirmed a $2.7 million sanction award imposed under inherent powers as a compensatory sanction. The majority held that sanctions can be compensatory even if the specific amount of sanctions is not directly caused by the alleged misconduct.

The first question presented is:

Is a federal court required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct when the court does not afford sanctioned parties the protections of criminal due process?

2. In *Roadway Express v. Piper*, 447 U.S. 752, 766 (1980) and *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), this Court held that a finding of subjective bad faith is required to award attorneys' fees as sanctions under inherent powers. In this context, the court of appeals held that a client is deemed bound by the acts of its attorneys and can suffer attorneys' fees as sanctions for its attorneys' alleged misconduct.

The second question presented is:

May a court award attorneys' fees under its inherent powers as sanctions against a client for actions by its attorney that are not fairly attributable to the client's own subjective bad faith?

LIST OF PARTIES

Petitioner The Goodyear Tire & Rubber Company ("Goodyear"), Fennemore Craig, P.C. and Graeme Hancock, and Basil Musnuff were Appellants in the Ninth Circuit proceedings.

Goodyear, Spartan Motors, Inc., and Gulfstream Coach, Inc. were defendants in the District of Arizona and the Maricopa County Superior Court.

Leroy Haeger, Donna Haeger, Barry Haeger, and Suzanne Haeger, Respondents to this Petition, were Appellees in the Ninth Circuit proceedings, and plaintiffs in the proceedings in the District of Arizona and the Maricopa County Superior Court.

RULE 29.6 STATEMENT

Petitioner Goodyear has no parent company and no publicly-held corporation owns 10 percent or more of Petitioner's common stock.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Goodyear respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit. This case, involving a $2.7 million sanction award, implicates two questions on which the Circuits are in conflict. Arising against the backdrop of inherent authority sanctions – which inflict tremendous consequences on attorneys and their clients alike – these questions are also exceptionally important.

First, the Ninth Circuit majority in this case expressly declined to require a causal connection between the sanctioned conduct and the civil monetary sanction imposed. As Judge Watford recognized in dissent, a finding of direct causation is essential to sustain an award of compensatory civil sanctions under the district court's inherent authority.

This Court in *Int'l Union v. Bagwell*, 512 U.S. 821 (1994), held that the imposition of punitive, non-compensatory sanctions must be accompanied by the procedural protections applicable in criminal cases. Following *Bagwell*, at least four circuits hold that the amount of fees awarded as compensatory sanctions must be tailored to the harm caused by the misconduct. The Ninth Circuit majority parted company with these courts by refusing to require a causal nexus between the conduct at hand and the sanctions imposed.

The majority's approach disregards the safeguards engrafted on inherent authority sanctions to restrain the unfettered exercise of a court's inherent

authority. This case presents an ideal vehicle for this Court to examine and clarify the standards that govern the imposition of civil sanctions under inherent powers, particularly in light of how the majority and dissent framed the issue at hand.

Second, inherent authority sanctions, unmoored by any statutory or rule constraints, must only be imposed upon a finding of subjective bad faith by the individual actor. Disregarding Supreme Court authority requiring bad faith by the sanctioned party, the Ninth Circuit deemed a client responsible for the alleged bad faith of its counsel. Not only does this rule conflict with this Court's requirements for inherent authority sanctions, but it also will erode the cornerstone of the attorney-client relationship by precluding clients from effectively relying on the advice of their attorneys. It also conflicts directly with the holding of the Eleventh Circuit that attorneys' fees cannot be imposed as sanctions on clients for the conduct of their counsel.

The decision below illustrates the devastating consequences for sanctioned parties who do not receive the procedural protections that are designed to constrain a court's inherent powers. This Court should accept *certiorari*, and reverse.

OPINIONS BELOW

The proposed order of the District of Arizona finding grounds for sanctions is unreported and reprinted in the appendix to this Petition ("Pet. App.") at 51a-82a. The decision of the District of Arizona imposing sanctions is reported at 906 F. Supp. 2d 938 (D. Ariz. 2012), and reprinted at Pet. App. 83a-172a. The decision of the District of Arizona allocating costs and fees is available at 2013

U.S. Dist. LEXIS 189796 (D. Ariz. Aug. 26, 2013), and reprinted at Pet. App. 173a-196a.

The original Ninth Circuit panel opinion is reported at 793 F.3d 1122 (9th Cir. 2015), and the panel opinion as amended is reported at 813 F.3d 1233 (9th Cir. 2016), and reprinted at Pet. App. 1a-50a. The order of the Ninth Circuit denying rehearing and rehearing en banc is unreported, available at 2016 U.S. App. Lexis 2722 (9th Cir. Feb. 16, 2016), and reprinted at Pet. App. 5a-6a. The Ninth Circuit issued a stay of its mandate, reprinted at Pet. App. 197a-200a, pending this Court's resolution of this Petition.

JURISDICTION

The divided Ninth Circuit issued its original opinion on July 20, 2015, and an amended opinion on February 16, 2016. Pet. App. 3a-5a. Petitioners filed a timely petition for rehearing and rehearing en banc, which the Ninth Circuit denied on February 16, 2016. *Id.* This timely Petition followed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This petition does not involve the interpretation of statutory provisions, but rather the federally-recognized "inherent authority" of a court to impose sanctions and the constitutional due process restraints upon such authority. *See* U.S. CONST. amend. V.

STATEMENT OF THE CASE

The action that led to this sanctions proceeding concerned a certain tire manufactured by Goodyear,

the "G159." Plaintiffs Leroy, Donna, Barry, and Suzanne Haeger commenced this action in 2005 against Goodyear and others, claiming, among other things, that a defect in a Goodyear G159 tire caused their accident. Pet. App. 8a. The district court exercised diversity jurisdiction over the underlying litigation pursuant to 28 U.S.C. § 1332. During this time period, Goodyear faced a number of lawsuits in different jurisdictions involving G159 tires. Goodyear accordingly retained Basil Munsuff and Roetzel & Andress to serve as its national coordinating counsel to, among other things, handle discovery across various G159 tire cases. *Id.* For this particular case, Goodyear also retained Graeme Hancock as local Arizona counsel to navigate the local rules and appear before the district court. *Id.*

The sanctions proceeding relates to discovery for particular categories of testing done on the G159 tire by Goodyear. As explained in Goodyear's Ninth Circuit briefing, during the underlying litigation, Goodyear conducted extensive document searches for testing results of the G159 tire. Goodyear located the particular tests now subject to dispute and turned them over to counsel by early 2007, shortly after Plaintiffs' first document requests were served and its expert report was received. *See* Pet. App. 11a. As Goodyear argued below, Goodyear's in-house counsel reviewed discovery responses drafted by counsel and relied on outside counsel to review and select the documents for production and provide advice on compliance with the discovery rules.

Goodyear objected to certain discovery requests that were (among other things) overly broad and unduly burdensome. Pet. App. 52a-53a. In their first request for documents, Plaintiffs sought

extremely broad discovery, demanding "[a]ll test records for the G159 tires." *Id.* at 9a, 52a. Goodyear later supplemented its initial response with test data on the G159 tire required by the Department of Transportation, but preserved its initial objections. *Id.* at 9a, 53a. Plaintiffs then served supplemental, more narrowly-tailored discovery relating to testing done to determine that the G159 tire was suitable to operate at highway speeds. *Id.* at 12a, 57a-58a. Counsel produced the test data for the one test Goodyear relied on to speed-rate this tire, but concluded that Plaintiffs' counsel had agreed to narrow the scope of their first request. *Id.* at 12a, 144a. Plaintiffs never filed a motion to compel "all tests" of the G159 tire, or any similar topic that would have encompassed the disputed tests at issue, notwithstanding the fact that they did seek court intervention regarding other discovery issues.

In April 2010, on the verge of trial, Plaintiffs reached a settlement with Goodyear, closing the case. *Id.* at 25a. Over a year after settlement, after reviewing an internet article about a jury verdict in a G159 case against Goodyear, Plaintiffs' counsel sought to reopen the matter in order to seek sanctions against Goodyear for alleged discovery misconduct. *Id.* at 13a. Plaintiffs accused Goodyear of committing discovery fraud primarily by not producing G159 testing documents relating to use of the G159 tire for highway speeds. *Id.* at 13a-14a. Plaintiffs adduced no evidence, however, that Goodyear actually used the non-produced tests at issue in approving the G159 tire for highway speeds.

Before holding a hearing, the court issued a "proposed order" finding misconduct by Goodyear and its counsel. *Id.* at 51a. The court concluded that

"[t]he misconduct at issue appears to have stemmed from a *deliberate corporate strategy* adopted by Goodyear to prevent the disclosure of the internal heat test results." *Id.* at 71a (emphasis added). Despite recognizing that sanctions on Goodyear required a finding of subjective bad faith, and despite acknowledging that "the present record does not indicate who is responsible for each instance of misconduct," the court nonetheless concluded that it "must impose sanctions." *Id.* at 81a-82a.

Discovery conducted during the sanctions proceedings, however, revealed that Goodyear conducted an extensive search for documents, had produced internal heat tests in other G159 cases. In this case, Goodyear located and promptly turned over to counsel the tire tests at issue. *See id.* at 11a. As Goodyear explained in its Ninth Circuit briefing, documents produced by Goodyear included candid communications between lawyer and client on a variety of subjects, but conspicuously absent was any directive from Goodyear to withhold any testing data from Plaintiffs. This wealth of post-hearing discovery revealed that Goodyear did what corporations are supposed to do—Goodyear opened its doors to outside counsel's document collection efforts and provided full access to its technical personnel.

Discounting or disregarding this evidence, the district court ultimately imposed sanctions relying largely on its conclusion that "Goodyear and its attorneys adopted a strategy" to obstruct discovery. Echoing its proposed order, the court found that outside counsel and Goodyear "adopted a plan" to obstruct discovery. Pet. App. 170a. The court sanctioned outside counsel and Goodyear pursuant to

its inherent authority. *See id.* at 7a. The court ordered that monetary sanctions be imposed on Goodyear, Mr. Musnuff, and Mr. Hancock. *Id.* at 17a-18a. In addition to a fee award, the court ordered Goodyear to file a copy of the sanctions order in any G159 tire case initiated after the date of that order. *Id.* at 18a.

Plaintiffs sought close to $2.9 million in fees and costs, representing nearly the entirety of the fees incurred over the history of the litigation. *See id.* at 44a, 185a. Despite objections by Goodyear and counsel, the district court awarded Plaintiffs $2,741,201.16 in fees and costs, all but a fraction of Plaintiffs' requested amount. *Id.* at 185a. Goodyear and Mr. Musnuff were held jointly responsible for 80% of the award, equaling $2,192,960.93. *Id.* In awarding that sizeable sum, the district court shifted "*all* the fees and costs incurred after" the purported discovery misconduct, early in the litigation. *Id.* at 180a (emphasis added); *see id.* at 44a.

In fashioning this massive award, the district court found it "inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct." *Id.* at 180a. The court concluded that "it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred." *Id.* at 151a-152a. Disregarding authority "that compensatory sanctions under a Court's inherent power must be limited to the amount necessary to compensate the opposing party for the harm caused by the misconduct," *id.* at 156a-157a, the court found that it "must be free to fashion an appropriate remedy," *id.* at 170a. Accordingly, the court concluded that "the most appropriate sanction is to award Plaintiffs *all* of the attorneys'

fees and costs they incurred after" early discovery. *Id.* at 152a (emphasis in original); *see id.* at 27a.

Despite acknowledging that the case may very well have proceeded to trial, the court presumed that the case "more likely than not would have settled much earlier" if Goodyear had produced the allegedly concealed tests. *Id.* at 152a. As the Ninth Circuit dissent noted, however, record evidence shows that production of these tests had no such effect. *Id.* at 44a-46a. In one case where Goodyear produced the disputed tests, the litigation proceeded all the way to a jury verdict. *See id.* at 46a.

Goodyear, Mr. Musnuff, and Mr. Hancock appealed, and a panel of the Ninth Circuit affirmed the imposition of sanctions. *Id.* at 42a. The court of appeals nominally recognized that, to award sanctions under inherent powers, "the sanctioned party's behavior" must amount to "bad faith." *Id.* at 21a. Nonetheless, the court held that Goodyear could be penalized for the conduct of its attorneys because "Goodyear 'is deemed bound by the acts of [its lawyers] and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.* at 26a (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962)).

In perfunctory fashion, the court also concluded that "the district court did not abuse its discretion in concluding that Goodyear participated directly in the discovery fraud." *Id.* at 26a. But the court of appeals identified no record evidence demonstrating that Goodyear employees, including in-house lawyers, deliberately attempted to delay or conceal the production of the tests in question. Nor did the court make any effort to engage with Goodyear's analysis of the facts, instead invoking *Link* for the

principle that Goodyear is responsible for the purported misconduct of counsel.

A divided panel affirmed the amount of sanctions, with Judge Watford in dissent concluding that Supreme Court authority requires a "causal link" between purported misconduct and compensatory sanctions. *Id.* at 44a-45a. Despite Plaintiffs' failure to establish a causal connection, the majority affirmed the entirety of the nearly $2.7 million in levied sanctions. The majority repudiated the rule "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct." *Id.* at 28a. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Diverged From This Court And Other Circuits By Authorizing Compensatory Sanctions Without Causation.

A. The Ninth Circuit's Decision Conflicts With The Authority Of Other Circuits On Compensatory Civil Sanctions.

The authority of federal courts to impose sanctions pursuant to their inherent powers is circumscribed by procedural protections for parties threatened with sanctions. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). Because the court's inherent power is so potent, it must be exercised "with restraint and discretion." *Id.* at 44. Likewise, a court must be cautious in exerting its inherent power to levy sanctions and "must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Id.*

The Ninth Circuit departed from the prevailing authority in the other Circuits requiring a direct causal connection between sanctioned misconduct and the amount of compensatory civil sanctions. Under *Int'l Union v. Bagwell*, a sanctions award may be either "civil" or "criminal." *Int'l Union v. Bagwell*, 512 U.S. 821, 836-39 (1994). *Bagwell* instructed that "conclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from the subjective intent of [the court imposing the sanction], but from an examination of the character of the relief itself." *Id.* at 828. A "civil" sanction must either offer the sanctioned party "an opportunity to purge" or be "compensatory." *Id.* at 829. A punitive award, which is intended to "vindicate the authority of the court," requires that the sanctioned party be afforded due process protections of the criminal process, *id.* at 828. These constraints on inherent powers dovetail with this Court's teaching that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with *restraint and discretion*." *Roadway Express Inc. v. Piper*, 447 U.S. 752, 764 (1980) (emphasis added).

The entire sanctions award in this case was affirmed as purely civil and compensatory. *See* Pet. App. 26a-39a. In *Bagwell*, the Court found that fines were not compensatory, but were of punitive character in part because they were not "*calibrate[d]* . . . to damages caused by the . . . contumacious activities." 512 U.S. at 834 (emphasis added). Because the substantial levied fines were "punitive," not "remedial," the Court ruled that the sanctioned parties were entitled to the protections of a criminal jury trial. Pet. App. at 829a, 831-39a. It is undisputed that the sanctioned parties in this case were not afforded criminal due process protections.

Subsequent to *Bagwell*, numerous circuits recognize that an award is compensatory only if the record reveals a causal connection between the misconduct the court found and the amount it awarded. The Eighth Circuit squarely holds that the amount of fees awarded as compensatory sanctions must be "directly" linked to the misconduct. In *Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 808 (8th Cir. 2005), the Eighth Circuit overturned a $50,000 monetary sanction imposed under a court's inherent powers because it "does not compensate [the injured party] for fees incurred as a direct result of [the sanctioned attorney's] conduct." Not only was the sanction payable to the court instead of the injured party, but it did not "relate[] *concretely* to costs . . . *directly incurred* because of [the sanctioned attorney's] actions." *Id.* (emphasis added); *see also Schwartz v. Kujawa* (*In re Kujawa*), 270 F.3d 578, 584 (8th Cir. 2001) (overturning monetary sanction against party in part because "[t]he amount is not related concretely to redressing the harm of [the party's] misconduct").

The Fourth Circuit also requires civil compensatory sanctions to be "*tailored* to compensate the complaining party." *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 378 (4th Cir. 2004) (quoting *Buffington v. Baltimore County*, 913 F.2d 113, 133 (4th Cir. 1990)) (emphasis added). In a case strikingly similar to this one, the Fourth Circuit vacated substantial monetary sanctions levied against a party and its attorney for discovery abuses after holding that the sanctions were "criminal in nature." 378 F.3d at 375. In the midst of discovery, the parties to a products liability action over allegedly defective electric blankets reached a settlement agreement. *Id.* at 374-76. Plaintiffs later

moved to reopen the case, and ultimately obtained sanctions against the defendant for its ongoing destruction of previously-requested discoverable materials. *Id.* The court of appeals overturned the civil fines because they failed "to compensate the complainant for losses sustained." *Id.* at 378. The sanctions could not be labeled "civil" because "the amounts of the fines were not determined by reference to any losses incurred by the [plaintiffs] as a result of [defendant's] alleged failure to complete discovery." *Id.*

Similarly, the D.C. and Seventh Circuits recognize that compensatory relief must be tailored to the actual harm caused by the misconduct. The D.C. Circuit, relying on *Bagwell*, vacated monetary sanctions "paid to the court and not at all calibrated to the damage caused by the [party's] conduct." *Evans v. Williams*, 206 F.3d 1292, 1295 (D.C. Cir. 2000); *see id.* at 1297 ("[I]t is not surprising that district courts around the country . . . have resisted the logic of *Bagwell*."). Applying the same principle in *United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001), the Seventh Circuit affirmed a civil contempt fines that "compensates the court and the government for actual losses sustained as a result of [the attorney's] refusal to appear at trial." The monetary sanction was deemed compensatory because "the district court *tailored* its sanction to compensate for these actual costs." *Id.* at 699-700 (emphasis added).

Finally, the Second, Fifth, Tenth, and Eleventh Circuits have each reversed monetary awards imposed without criminal procedures where the sanctions were non-compensatory. *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 129 (2d Cir. 1998)

(reversing a $10,000 punitive fine that "was not intended to be compensatory" but imposed without criminal procedures sanction); *Crowe v. Smith*, 151 F.3d 217, 221 (5th Cir. 1998) (reversing order "imposing serious criminal sanctions ... via a manifestly civil process"); *Law v. NCAA*, 134 F.3d 1025, 1029 (10th Cir. 1998) (reversing "daily fine [that] is not compensatory, even though ordered paid to plaintiffs"); *In re E.I. DuPont de Nemours & Co.-Benlate Litigation*, 99 F.3d 363, 369 (11th Cir. 1996) (reversing an over $13 million punitive fine imposed without criminal procedures that was "designed to punish [party] for flouting the authority of the district court").

The Ninth Circuit's decision stands in irreconcilable conflict with *Bagwell* and its progeny. The divided court of appeals rejected the rule "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct." Pet. App. 28a. As explained by Judge Watford in dissent, the majority disregarded "the well-established principle that a sanction can be deemed compensatory only if it compensates the injured party for losses sustained *as a result of* the sanctionable misconduct." *Id.* at 47a (emphasis in original). Here, the entire $2.7 million sanctions award "cannot be deemed compensatory" because the record reveals no "causal connection between the misconduct the court found and the amount it awarded." *Id.* at 44a. The majority's decision declining to require a causal "linkage" between the sanctioned conduct and the awarded damages directly conflicts with this Court's precedent and the precedent of other Circuits.

B. The Ninth Circuit's Decision Cannot Be Reconciled With This Court's Precedent.

Dispensing with a "linkage" requirement, the majority held that a causation requirement "flouts controlling United States Supreme Court case law" embodied in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991), a decision pre-dating *Bagwell*. Pet. App. 28a. The majority read *Chambers* as establishing that a fee award may be deemed compensatory even if the fees were not incurred as a result of the misconduct, so long as the misconduct involves "frequent and severe abuses of the judicial system." 501 U.S. at 56. As the dissent elucidates, the majority misreads *Chambers* and overlooks later Supreme Court authority that forecloses its interpretation. *See* Pet. App. 47a-49a (Watford, J., dissenting).

Chambers did not signal a retreat from the causation requirement for sanctions awards. In that case, the district court sanctioned Mr. Chambers for perpetrating fraud on the court and exhibiting bad faith in defending a suit in the first instance. 501 U.S. at 37-39, 49-51. As Judge Watford explained, "[b]ecause the district court found that *Chambers* never had a good-faith basis for resisting the relief NASCO sought . . . , it seems fair to say that all of NASCO's attorney's fees were incurred as a direct result of Chambers' misconduct." Pet. App. 48a. *Chambers* also expressly noted a causal connection between the sanctioned conduct and the levied fees. After Mr. Chambers attempted to sabotage the sale of a radio station through litigation tactics, the Court held that "Chambers' bad-faith conduct in the course of the litigation *caused* the delay for which damages

were sought and *greatly complicated* the closing of the sale[.]" 501 U.S. at 56 n.20 (emphasis added).

To be sure, the *Chambers* Court also discussed "the frequency and severity of [the] abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." *Id.* at 56. But the Court did not suggest that it was abandoning a causation requirement. Rather, the Court rejected Mr. Chambers' assertion that the district court had "failed to tailor sanctions to the particular wrong," concluding instead that the full amount of attorneys' fees were an appropriate sanction in light of the particular facts. *Id.* at 56-57. Furthermore, as Judge Watford noted, "even if some portion" of the fees were not incurred "as a direct result" of misconduct, *Chambers* made clear that the sanctions award was "partly punitive," Pet. App. 48a-49a, while the award in the instant case was upheld as purely compensatory.

Chambers, moreover, is not this Court's last word on monetary sanctions. *See id.* at 49a (Watford, J., dissenting) ("Moreover, the law has changed since Chambers was decided."). Subsequent to *Chambers*, this Court in *Bagwell* reversed a civil contempt sanction where the trial court did not "calibrate the fines to damages caused by the" sanctioned behavior or "indicate that the fines were to compensate the complainant for losses sustained." *See Bagwell*, 512 U.S. at 834 (internal quotation marks omitted). The Court explained that an appropriate civil fine "is remedial," and thus limited to compensatory sanctions, *id.* at 827; but a fine that "is punitive, to vindicate the authority of the court" falls outside the scope of a civil sanction and requires the protections of the criminal process. *Id.* at 845. The courts of

appeals have extended the reasoning of *Bagwell* from the contempt context to sanctions imposed under inherent authority. *See, e.g., Mackler Prods.*, 146 F.3d at 128; *F.J. Hanshaw Enters. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137 (9th Cir. 2001).

The sanctions imposed in this case fail the *Bagwell* test. The district court awarded "all of the attorney's fees incurred by the Haegers after Goodyear breached its discovery obligations," Pet. App. 44a (Watford, J., dissenting), on the assumption that the case would have immediately settled after disclosure of the disputed tests. *See id.* at 45a-46a, 152a. But the district court acknowledged that when Goodyear produced the test results in a similar suit, the case proceeded to trial. *Id.* at 123a; *see id.* at 152a. Therefore, it declined to impose any type of causation requirement for the $2.7 million award. Accordingly, there is no basis in the record for "causal link" to support the sanctions award.

C. The Issue Presented Is Important, and This Case Presents a Good Vehicle for Resolving It.

This case presents an ideal vehicle for addressing this important issue. The majority and dissent squarely considered whether compensatory civil sanctions must be directly caused by purported misconduct, arriving at opposite legal conclusions. The majority acknowledged that large non-compensatory sanctions require criminal contempt procedures. Pet. App. 34a. But the court invented its own exception to the rule that civil sanctions must be compensatory. Under this new formulation, the causation requirement is obviated where a district court finds "frequent and severe abuses." *Id.* at 32a. Cut from whole cloth, this exception

contradicts Supreme Court precedent and the law in other Circuits.

Judges and litigants are entitled to a clear answer on what restraint or standard (if any) controls a federal court's imposition of compensatory sanctions under its inherent powers. A causation requirement protects litigants from judicial overreach and ensures that litigants receive appropriate procedural due process when facing criminal penalties with far-reaching professional and financial consequences. The majority's opinion conflicts irreconcilably with *Bagwell* and the authority of other Circuits on this point. This Court should intervene to remedy this conflict and establish clear standards to guide courts' discretion in imposing compensatory sanctions.

II. The Ninth Circuit Diverged From This Court And the Eleventh Circuit By Permitting Attorneys' Fees Sanctions Under Inherent Powers Against A Client For The Conduct Of Its Attorneys.

A. The Ninth Circuit's Decision Violates This Court's Bad-Faith Requirement Constraining The Award of Attorney's Fees as Sanctions.

In affirming sanctions against Goodyear, the Ninth Circuit rejected the prevailing rule that inherent authority sanctions must be based on subjective bad faith of the individual party, rather than premised on the conduct of others. The Ninth Circuit's ruling that attorney's fees can be levied as sanctions against a client for the conduct of its attorney conflicts directly with authority from this Court and the Eleventh Circuit. It also stands inconsistent with the wealth of cases that insist upon

individualized findings of bad faith to support inherent authority sanctions.

Before awarding sanctions under its inherent powers, a court must find that the purported misconduct "constituted or was tantamount to bad faith." *Roadway Express v. Piper*, 447 U.S. 752, 767 (1980) (recognizing "[t]he bad-faith exception for the award of attorney's fees"). Reversing an award of sanctions levied against counsel for discovery violations, *Roadway Express* held that a bad-faith finding "would have to precede any sanction under the court's inherent powers." *Id.* Such a finding is especially critical when the court uses its inherent powers to assess attorneys' fees, as it did in this case. *See Chambers*, 501 U.S. at 47 ("The narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders."). Moreover, this finding must be individualized. *See, e.g.*, *CTC Imports & Exports v. Nigerian Petroleum Corp.*, 951 F.2d 573, 578 (3d Cir. 1991) ("Where, however, the court sanctions more than one party, it must make particularized findings and conclusions as to each party's liability considering his or her unique circumstances.").

In this case, relying on *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962), the Ninth Circuit affirmed an award of attorneys' fees against Goodyear for the actions of its lawyers. Pet. App. 26a ("Goodyear 'is deemed bound by the acts of [its lawyers] and is considered to have notice of all facts, notice of which can be charged upon the attorney.'"). The court of appeals obviated the need for an individualized finding that a party acted in

bad faith, instead concluding that the client is accountable for its attorney's bad-faith misconduct.[1]

Link, however, pre-dates Supreme Court authority mandating a bad-faith finding when *attorneys' fees* are imposed under a court's inherent powers in derogation of the American Rule. Emphasizing the court's authority to manage its docket, *Link* affirmed dismissal for failure to prosecute and did not involve the sanction of *attorneys' fees*. *See* 370 U.S. at 633. *Link*, moreover, did not involve any bad faith finding whatsoever and thus had no occasion to consider the subjective bad faith standard recognized by later precedent.

The Ninth Circuit's holding irreconcilably conflicts with this Court's bad-faith requirement in the attorneys' fees context. After *Link*, this Court in *Chambers* emphasized that attorneys' fees imposed as inherent authority sanctions must be supported by a bad-faith finding. *See Chambers*, 501 U.S. at 45-53 (collecting cases). *Chambers* reaffirmed the limited scope of the "bad faith exception" to the American Rule on fee-shifting: "[T]he narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders. . . ." *Id.* at 47.

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[1] As both counsel will argue in their respective petitions, they did not act in bad faith, and if they were to prevail on their challenges to the sanctions award, Goodyear would necessarily win as well. This argument is unique to Goodyear's position.

Chambers also implicitly recognized that a bad-faith finding must be "personalized." In *Chambers*, the sanctioned party protested that the fees award was "not 'personalized' because the District Court failed to conduct any inquiry into whether he was personally responsible for the challenged conduct." 501 U.S. at 57. This Court deemed that assertion "flatly contradicted by the District Court's detailed factual findings concerning Chambers' involvement in the sequence of events at issue." *Id.* at 57-58. Rather than merely following the advice of counsel, the party himself engaged in "relentless, repeated fraudulent and brazenly unethical efforts." *Id.* at 58. *Chambers*, however, did not suggest that the sanctions could stand absent these individualized bad-faith findings.

Link not only predates these developments in *Chambers*, but it also precedes the Court's recognition of the distinctions between compensatory and punitive sanctions and its requirement of due process protections for any non-compensatory awards. *Bagwell*, 512 U.S. at 836-39. Thus, the Ninth Circuit's holding that a party's own bad faith need not be considered when assessing fees as sanctions runs afoul of this Court's recent authority.

B. The Ninth Circuit and the Eleventh Circuit Are In Conflict.

The Ninth Circuit's decision also directly conflicts with the position of the Eleventh Circuit. The Ninth Circuit held that Goodyear could not "pass[] the blame on to its attorneys" because Goodyear is "deemed bound by the acts of [its lawyers]." Pet. App. at 26a. In contrast, the Eleventh Circuit holds that attorneys' fees cannot be imposed as sanctions on clients for the conduct of their counsel. In *Byrne*

v. Nezhat, 261 F.3d 1075, 1123 (11th Cir. 2001), the court of appeals vacated a monetary sanction levied against a party because "the court impermissibly relied solely on the actions of counsel." The court held that a district court imposing such sanctions "should make *specific* findings as to *the party's conduct* that warrants sanctions." *Id.* at 1123 (emphasis added). The fact that the client relied on counsel did not justify sanctions. *Id.* at 1125-26. On the contrary, sanctions were vacated because the client herself did not "knowingly file[] and continue[] to prosecute the case in bad faith." *Id.* at 1127.

The Eleventh Circuit recently summarized its holding as follows:

> While a client may be made to suffer litigation losses because of her attorney's missteps, the *Byrne* decision rejects the notion that an innocent client must also suffer sanctions because of misconduct by her attorney that is not fairly attributable to her. Without more, the rule that the sins of the lawyer are visited on the client does not apply in this context, and a court must specify conduct of the plaintiff herself that is bad enough to subject her to sanctions.

DeLauro v. Porto (In re Porto), 645 F.3d 1294, 1304 (11th Cir. 2011). The position of the Eleventh Circuit follows inexorably from the requirement that fee-shifting sanctions require individualized findings of bad-faith. *See also Martin v. Brown*, 63 F.3d 1252, 1265 (3d Cir. 1995) ("Any sanctions imposed against Bender should also be imposed solely because of her own improper conduct without considering the conduct of the parties or any other attorney."). In other words, the Eleventh Circuit's holding was

unremarkable – it just concluded that there is no exception for clients from the individualized bad faith requirement.

Rejecting this precedent, the Ninth Circuit also concluded that "the district court did not abuse its discretion in concluding that Goodyear participated directly in the discovery fraud," but did not identify specific grounds supporting a bad-faith finding. Pet. App. at 25a. The Ninth Circuit relied on the district court's conclusion that "in-house counsel . . . maintained responsibility for reviewing and approving all the incomplete and misleading discovery responses." *Id.* But sanctions under inherent powers require "bad faith," not negligence; accordingly, the Eleventh Circuit in *Byrne* vacated sanctions where the client "relied on" counsel in good faith. *Byrne*, 261 F.3d at 1125-26; *see id.* at 1120 (client demonstrates bad faith by "knowingly or recklessly raises a frivolous argument" or "delaying or disrupting the litigation or hampering enforcement of a court order"). Significantly, there is no finding that Goodyear did not rely in good faith on outside counsel.

The Ninth Circuit also relied on the district court's findings that Goodyear's corporate representative "falsely testified" about what tests were available. Pet. App. at 25a. As the Eleventh Circuit in *Byrne* explained, "[s]tanding alone, a false or inconsistent statement in a deposition does not compel the conclusion of bad faith." 261 F.3d at 1125. The district court in *Byrne* based its bad-faith finding on "several false assertions in affidavits, depositions, and sworn statements" made by the client. *Id.* at 1124. Even accepting the statements as false, the court of appeals found no basis for inferring that the

statements were made "for a harassing or frivolous purpose" sufficient to constitute bad faith. *Id.* In this case, the district court misconstrued testimony by Goodyear's representative and disregarded Goodyear's explanations of his statements. The Ninth Circuit, moreover, declined to address any of Goodyear's arguments regarding this testimony.

Fundamentally, the Ninth Circuit failed to explain how Goodyear's conduct supported the sanctions award in this case. Unlike other Circuits, the Ninth Circuit left open whether clear and convincing evidence is required to show bad faith. *Compare Lahiri v. Universal Music & Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010) (declining to decide standard because clear and convincing evidence of misconduct supported bad faith finding), *with Ali v. Tolbert*, 636 F.3d 622, 627 (D.C. Cir. 2011); *Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 499 (7th Cir. 2008); *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287-88 (10th Cir. 1986); *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982).

Whatever the clear and convincing standard means, at a minimum, it requires the court to address and respond to the sanctioned party's explanations of the facts. Here, offering only conclusory assertions in response to Goodyear's evidence that it reasonably relied on counsel in the course of discovery, the court of appeals failed to respond to Goodyear's factual defenses and failed to articulate how Goodyear's conduct demonstrates subjective bad faith. Unable to make this showing, the court of appeals instead relied primarily on its erroneous conclusion that Goodyear was liable for the actions of its attorneys. The decision below thus

illustrates the importance of a rigorous evidentiary standard for imposing sanctions.

C. This Case Affords The Court The Opportunity To Clarify The Law On An Important Issue.

This Court should accept *certiorari* and adopt the position of the Eleventh Circuit, and reaffirm the basic principle that inherent authority sanctions require individualized findings of bad faith. Among other things, the Ninth Circuit's ruling would eviscerate the advice of counsel defense, imperiling the ability of clients to rely on outside counsel's advice in discovery. In light of the practical difficulties of coordinating cases all over the country, subject to a panoply of different rules, Goodyear reasonably and necessarily relied on outside counsel's expertise in the discovery process. And like any other attorney-client relationship, for it to be successful, Goodyear had to be free to trust and rely upon the advice of its counsel.

This underscores a pragmatic problem raised by the district court's sanctions order. The court essentially faulted Goodyear for alleged discovery lapses by counsel, in the process assuming Goodyear's omniscience. That a client retains final say on certain matters does not mean that the client must scrutinize every document that is produced or not produced in discovery. Nor does that reflect the practical reality in any civil litigation, from antitrust to personal injury. Neither corporations nor individuals are generally equipped to micromanage every aspect of the litigation process; rather, they hire outside lawyers for just that purpose.

This is not to say that a party can simply wash its hands of anything done by counsel, but if a party is going to be sanctioned for the actions of its counsel based on inherent powers, the court needs to find that the party deliberately directed the improper activity and thus itself acted in bad faith. *See Byrne*, 261 F.3d at 1123 ("Sanctionable conduct by a party's counsel does not necessarily parlay into sanctionable conduct by a party."). Because a party is entitled to rely on an attorney's advice about legal matters, courts "have generally declined to impose sanctions on represented parties," particularly where the offending conduct relates to work within the competence of counsel. *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 398 (6th Cir. 2009); *see Barrett v. Tallon*, 30 F.3d 1296, 1302–03 (10th Cir. 1994) (client should not be sanctioned if offending conduct relates to work that lies within competence of counsel).

In the rare instances where courts have found it appropriate to sanction a client rather than an attorney, the client has been directly responsible for the actions in question. In the discovery context, for example, sanctions have been imposed on parties for failing to adequately search for and provide outside counsel with responsive documents. *See, e.g.*, *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 94-96 & nn.32-33, 103 (D.N.J. 2006) (defendant "chose not to disclose" to outside counsel that its email system automatically removed email from active files); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436 (S.D.N.Y. 2004) (sanctioning party where in-house counsel failed to ensure adherence to litigation hold by employees); *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911, 66 (S.D. Cal. Jan. 7, 2008), *aff'd in part and vacated in part*, 548 F.3d

1004 (Fed. Cir. 2008) (sanctioning client who failed to conduct search for responsive documents and whose "employees were integral participants in hiding documents and making false statements to the court and jury"). Goodyear, in contrast, opened its doors to outside counsel's discovery efforts, locating and providing to outside counsel the very tests in question.

This Court should not let stand a rule under which a client cannot trust and rely upon advice of outside counsel on discovery matters. Such an approach defeats the very purpose of retaining outside counsel. Without action by this Court, the foundation of the attorney-client relationship, whereby clients are entitled to trust their lawyers and rely on their advice, is severely eroded.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for a writ of *certiorari*.

Dated: May 16, 2016

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-17718

D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation,

Defendant-Appellant,

and

SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation,

Defendants,

v.

ROETZEL & ANDRESS, LPA; BASIL J. MUSNUFF,

Movants.

No. 13-16801

D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation,

Defendant-Appellant.

No. 13-16861

D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation; SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation,

Defendants,

v.

BASIL J. MUSNUFF,

Movant-Appellant.

No. 13-16862

D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation; SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation,

Defendants,

v.

FENNEMORE CRAIG, P.C.; GRAEME HANCOCK,

Movants-Appellants.

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, Senior District Judge, Presiding

Argued and Submitted
March 10, 2015—San Francisco, California

Filed July 20, 2015
Amended February 16, 2016

Before: J. Clifford Wallace, Milan D. Smith, Jr., and Paul J. Watford, Circuit Judges.

Order;

Opinion by Judge Milan D. Smith, Jr.;
Dissent by Judge Watford

ORDER AND AMENDED OPINION

SUMMARY*

Sanctions

The panel affirmed the district court's order imposing monetary sanctions against attorneys Basil Musnuff and Graeme Hancock and The Goodyear Tire & Rubber Company, and non-monetary sanctions against Goodyear.

The panel held that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case, and to determine that Fed. R. Civ. P. 37 did not provide the appropriate remedy, especially since the discovery fraud was not discovered until after the cases had settled.

The panel held that it was not abuse of discretion to find that the Sanctionees each acted in bad faith. The panel also held that the district court acted well within its discretion in awarding all the attorneys' fees and costs incurred by the Plaintiffs after Goodyear served its supplemental responses to Plaintiffs' First Request. The panel held that the district court did not abuse its discretion in imposing non-monetary sanctions on Goodyear.

The panel held that the district court's imposition of non-monetary sanctions against Goodyear was balanced, narrowly tailored, and imposed no sanctions beyond what was necessary to remedy what the district court perceived as an ongoing problem in Goodyear's litigation.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Judge Watford dissented. He agreed with the majority that the district court's misconduct findings were supported by the record, but he would nonetheless conclude that the $2.7 million sanctions award must be vacated because Goodyear and its lawyers were not afforded heightened procedural protections before punitive sanctions were imposed.

COUNSEL

Pierre H. Bergeron (argued), Squire Sanders LLP, Cincinnati, Ohio; George Brandon, Squire Sanders LLP, Phoenix, Arizona; Jill G. Okun, Squire Sanders LLP, Cleveland, Ohio, for Defendant-Appellant/Defendant The Goodyear Tire & Rubber Company.

Mark I. Harrison (argued), Jeffrey B. Molinar, Osborn Maledon, PA, Phoenix, Arizona, for Movant/Movant-Appellant Basil J. Musnuff.

Andrew M. Jacobs, (argued), Katherine V. Foss, Snell & Wilmer LLP, Tucson, Arizona; James R. Condo, Lisa M. Coulter, Snell & Wilmer LLP, Phoenix, Arizona, for Movant-Appellant Graeme Hancock.

John J. Egbert (argued), Jennings Strouss & Salmon, PLC, Phoenix, Arizona; David L. Kurtz, The Kurtz Law Firm, Scottsdale, Arizona, for Plaintiffs-Appellees.

ORDER

The opinion and dissent filed on July 20, 2015 and published at 793 F.3d 1122 are hereby amended. The amended opinion and dissent are filed concurrently with this order.

With these amendments, Judge M. Smith voted to deny the petitions for rehearing en banc, and Judge

Wallace so recommends. Judge Watford voted to grant the petitions.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing en banc are DENIED.

Future petitions for panel rehearing and petitions for rehearing en banc will not be entertained.

OPINION

M. SMITH, Circuit Judge:

On November 8, 2012, after a six-hour evidentiary hearing, and after considering the record in the case and fifteen briefs filed by the potentially-sanctionable parties, then-Chief United States District Judge Roslyn O. Silver, of the United States District Court for the District of Arizona, handed down a sixty-six-page order (Order) imposing sanctions ultimately calculated in the sum of $548,240 against attorney Graeme Hancock (Hancock), and $2,192,961 jointly against attorney Basil J. Musnuff (Musnuff) and The Goodyear Tire & Rubber Company (Goodyear) (collectively the Sanctionees). In the Order, which included forty-nine pages of findings of fact and seventeen pages of legal analysis, Judge Silver found that "there is clear and convincing evidence that sanctions are required to be imposed against [] Hancock, [] Musnuff, and Goodyear. The Court is aware of the unfortunate professional consequences that may flow from this Order. Those consequences, however, are a direct result of repeated, deliberate

decisions by [] Hancock, [] Musnuff, and Goodyear to delay the production of relevant information, make misleading and false in-court statements, and conceal relevant documents. [] Hancock, [] Musnuff, and Goodyear will surely be disappointed, but they cannot be surprised."[1]

Because the fraud and deceit practiced on the district court and the Plaintiffs by the Sanctionees was not discovered until after the underlying litigation had been closed and Plaintiffs had settled with Goodyear based upon the incomplete information provided by the Sanctionees, the district court imposed the sanctions in reliance upon its inherent power, and not under Federal Rule of Civil Procedure 11, or 28 U.S.C. § 1927.

The Sanctionees appeal from the judgment awarding the sanctions, arguing that the district court abused its discretion in relying upon its inherent power to impose sanctions, and in determining the amount and the nature of the sanctions imposed.

We affirm both the district court's monetary and non-monetary sanctions imposed against the Sanctionees.

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[1] The district court began its order with the following powerful declaration, which warrants the attention of all members of the bar: "Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests.[] The little voice in every attorney's conscience that murmurs turn over all material information was ignored."

FACTUAL AND PROCEDURAL BACKGROUND

In June 2003, Leroy and Donna Haeger, and Barry and Suzanne Haeger (collectively the Haegers, or Plaintiffs) were all seriously injured when one of the Goodyear G159 tires on the front of their motor home failed while they were driving on a highway, which caused their vehicle to swerve off the road and overturn. The Haegers retained attorney David Kurtz (Kurtz), who filed suit against Goodyear in 2005 in Arizona state court. The case was quickly removed to federal court by Goodyear. Goodyear was represented by Musnuff, who served as Goodyear's "national coordinating counsel" on all G159 cases, and Hancock, who served as Goodyear's local counsel in Arizona. Musnuff and Goodyear's in-house counsel, Deborah Okey (Okey), were responsible for reviewing and approving all discovery responses in the case.

Before releasing its G159 tire, Goodyear performed FMVSS119 Department of Transportation (DOT) tests, electronic post-production W84 high speed test data (High Speed tests), L04 heat rise test results (Heat Rise tests), DOT endurance tests, crown durability tests, and bead durability tests on the tire. Throughout discovery, the Haegers repeatedly sought the results of Goodyear's tests on the G159 tire. However, as detailed below, Goodyear, Musnuff, and Hancock failed to search for, and/or withheld these relevant and responsive G159 testing documents in violation of their discovery obligations to produce requested relevant documents, and to supplement prior disclosures. *See* Fed. R. Civ. Pro. 26, 34.

Goodyear served its Initial Disclosure Statement on the Plaintiffs on December 15, 2005, pursuant to Rule 26. The initial disclosures did not include testing information, and Kurtz promptly requested

that Goodyear produce "[t]esting documentation regarding the G159 tires." Nevertheless, Goodyear did not supplement the disclosures in its Initial Disclosure Statement. Goodyear propounded interrogatories asking for, among other things, "each legal theory under which you believe Goodyear is liable." In response, on August 18, 2006, the Haegers articulated their theory of the case: "Prolonged heat causes degradation of the tire which, under appropriate circumstances, can lead to tire failure and tread separation even when the tire is properly inflated." Additionally, the Haegers stated that when the G159 tire was used on motor homes, the tire produced a level of heat and degradation "which the tire was not designed to endure, leading to its premature failure."

The Haegers served their First Request for Production of Documents (First Request), pursuant to Rule 34, in September 2006. "Request for Production Number 14" requested "[a]ll test records for the G159 tires, including, but no[t] limited to, road tests, wheel tests, high speed testing, and durability testing." Goodyear objected to this request with a series of boilerplate objections, and failed to produce any documents. However, on November 1, 2006, in its supplemental response to "Request for Production Number 14," Goodyear agreed to produce the FMVSS119 DOT tests for the G159 tire. On December 20, 2006, Kurtz sent Hancock a letter clarifying what had been requested:

> *Request for Production No. 14.* We asked for test records for the G159 275/70R 22.5, including road tests, wheel tests, high speed testing, and durability testing. You objected, suggesting the test records were overly broad

> and unduly burdensome. You have only produced the DOT test data showing the tires were tested at 30 mph. My interest is in finding the rest of the test data. If there is any, it is your obligation to disclose it.

On January 2, 2007, Hancock wrote an email to Musnuff regarding "Request for Production Number 14," stating:

> We should either respond to any portions of Kurtz' 12.20 letter or figure out that we have a fight on our hands on these points and prepare a counter argument . . . RTP 14. [. . .] [t]est records for all testing on this size G159 tire. Again, was the only testing at 30 mph or less? What speed testing/fleet testing did Goodyear rely on? Can/should we supplement since his theory is that this tire can't operate at 75 mph in the southwest for long periods?

On January 5, 2007, the Haegers's expert witness, David Osborne (Osborne), identified speed as a contributing factor in the G159 tire's failure in his expert report. In response to Osborne's report, Musnuff wrote to Hancock:

> Osborne appears to draw the conclusion that the subject tire was only tested at speeds up to 30 mph from the fact that the only test data we produced is the DOT test data. Of course, our discovery response was limited to DOT test data because plaintiff had not yet identified their defect theory at that time. Now that plaintiffs are pinpointing speed as an issue, perhaps we need to supplement our

> discovery responses to show the testing of this tire at various speeds. Thoughts?

Musnuff also forwarded this email to Goodyear's in-house counsel, Okey, concluding "we should consider supplementing our discovery responses to show the testing of this tire at various higher speeds." Despite Goodyear's understanding of its obligation to supplement its previous discovery responses, they were not supplemented.

Also in January 2007, one of Goodyear's tire engineers located the G159 tire's High Speed tests and Heat Rise tests. It is clear that the engineer delivered at least the High Speed tests to Musnuff because on February 12, 2007, Musnuff emailed the High Speed tests to Hancock. Neither Musnuff nor Hancock produced these tests to the Haegers. Instead, on April 6, 2007, when Judge Silver asked Hancock "is there any internal documentation that is available that has been requested that your . . . clients have not provided," Hancock responded that Goodyear had "responded to all outstanding discovery . . . if a document shows up, we'll of course produce it and supplement our answers." This response to Judge Silver was false. At the time of this statement, Hancock had been sent the High Speed tests and had stated to Musnuff that they should be produced promptly "given the accusation of no high speed testing in the January report that put that at issue in the case"; it was thus a false representation to state that Goodyear had responded to all outstanding discovery.

Additionally, as a follow up to his receipt of the High Speed tests, Musnuff emailed Goodyear's tire engineer requesting additional data, explaining "if we disclose any of the [High Speed] testing – which is in our best

interest – then we need to produce all of it." Despite the fact that these High Speed testing documents were responsive to the Haegers' discovery request, Musnuff was still undecided about whether they were going to be produced.

On May 8, 2007, the Haegers served a Third Request for Production of Documents (Third Request) requesting tests related to whether the G159 tire was suitable for use at a speed of 75 mph. At a discovery dispute hearing on May 17, 2007, Hancock admitted that there were tests available showing that the tire was tested for speeds above 30 mph, but did not mention that Goodyear had been withholding these tests from the Haegers for approximately four months. Instead, Hancock represented that Goodyear would now produce these tests because of the new obligation arising from the Haegers' Third Request. This was a misrepresentation to the court as Hancock had known that these High Speed tests were responsive to the First Request since February 2007.

On May 21, 2007, Goodyear deposed Osborne, the Haegers' expert witness. Osborne was deposed while under the impression that no high speed testing of the tire had been done. Neither Hancock nor Musnuff disclosed that Goodyear was withholding the High Speed tests. The district court found that taking Osborne's deposition "knowing that Mr. Osborne was operating under incorrect assumptions and an incomplete record," could only have been done "to delay production of the tests in hopes of gaining a tactical advantage."

Goodyear finally produced the High Speed tests on June 21, 2007, again representing that the production was in response to the Third Request, when these tests were actually responsive to the First Request.

On September 13, 2007, Richard Olsen (Olsen), Goodyear's Rule 30(b)(6) witness, testified during a deposition that while additional tests had been undertaken to determine if Goodyear could justify a speed rating of the G159 tire at 75 mph, none of these additional tests was available. Such tests were clearly in addition to the High Speed tests that had been turned over to the Haegers. Shortly after Olsen's deposition, on October 19, 2007, Hancock assured the court that there were no other tests in existence beyond those already produced to the Haegers. Despite the Haegers' demands for production, during pre-trial discovery, Goodyear disclosed only the FMVSS119 DOT tests and the High Speed tests.

On April 14, 2010, the first day of trial, the Haegers and Goodyear informed the court that they had reached a settlement, and the court closed the case. Based on the information derived from the results of at least one of the Other G159 Cases (discussed below), without having the relevant information in their possession due to the Sanctionees' deceit, the Haegers apparently settled for a small fraction of what they might otherwise have done.

Some time after the case had settled, Kurtz saw an article stating that Goodyear had produced internal heat and speed testing in a separate case involving the G159 tire, and he realized that Goodyear had withheld evidence it was required to produce during discovery. Kurtz filed a motion for sanctions on May 31, 2011. The motion for sanctions argued that Goodyear had engaged in discovery fraud by "knowingly conceal[ing] crucial 'internal heat test' records related to the defective design of the G159." Goodyear's opposition to the motion argued that it "never represented that the

DOT test data comprised the totality of testing with regard to the G159 tire." Goodyear further argued:

> Nor did Goodyear ever state or imply that it would produce "all test records for the G159 tires" or identify *all* tests performed on the G159 tires as sought in plaintiffs' initial discovery requests. Rather, Goodyear objected to these requests and stated precisely which test records it agreed to produce, unambiguously indicating that it would not produce *all* test data.

This argument came as a surprise to the district court and it admitted that it "was under the impression that Goodyear had produced all test data relevant to Plaintiffs' claims."

On October 5, 2011, finding that there were "serious questions regarding [Goodyear's] conduct in this case," the district court ordered Goodyear to produce "the test results at issue." Goodyear produced the Heat Rise tests, but did not mention any additional tests.

On February 24, 2012, the district court issued a proposed order sanctioning Goodyear based on Goodyear's failure to produce the Heat Rise tests and the repeated representations made by Hancock to the district court that all responsive documents had been produced. The district court's proposed order concluded that the Heat Rise tests should have been produced in response to the First Request. In responding to this proposed order, Goodyear, *apparently by accident*, disclosed the existence of additional G159 tests – the crown durability, bead durability, and DOT endurance tests – none of which had been mentioned or produced in the litigation. The court also discovered that Olsen, Goodyear's Rule 30(b)(6) witness, knew

about, but failed to mention, these additional tests at his deposition. The district court held that these tests should also have been produced as responsive to the Haegers' First Request.

The district court held an evidentiary hearing on March 22, 2012, at which both Musnuff and Hancock testified that they had not knowingly engaged in discovery fraud. The district court found their testimonies to be untruthful and unreliable, and held that "Mr. Hancock, Mr. Musnuff, and Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits."

In its Order, the district court reviewed Goodyear's discovery responses in certain other G159 tire failure actions (collectively the Other G159 Cases) against Goodyear in order to compare what the Sanctionees knew, and when they knew it, with regards to the G159 tests.[2] In *Woods v. Goodyear*, No. CV 04-45 (Circuit Court of Hale County, Alabama), in August 2007, a Goodyear employee informed Musnuff that in addition to the High Speed tests, the tests used to determine the suitability of the G159 to be driven at 65 mph included FMVSS119 DOT tests, Heat Rise tests, bead durability tests, crown durability tests, W16 tests, W64 tests, G09 tests, and L04 tests. In *Schalmo v. Goodyear*, No. 51 2006-CA-2064-WS (Fla. Cir. Ct., 6th Cir., Pasco County), in April 2008, Musnuff and Goodyear produced the Heat Rise tests in response to a request to produce tests associated with speed rating. Musnuff wrote an email in May

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[2] The district court considered Hancock, Musnuff, and Goodyear's conduct in the Other G159 Cases for the purpose of assessing credibility, and determining the actors' state of mind. It expressly did not base its sanctions on the Sanctionees' conduct in the Other G159 Cases.

2009 stating that the *Schalmo* plaintiffs "highlighted the Heat Rise testing taken during the durability testing of the G159." This case ended in a plaintiff's verdict of $5.6 million. Finally, in *Bogaert v. Goodyear*, No. CV 2005-051486 (Sup. Ct. of Maricopa County, Arizona), in response to an order from the court to produce testing of the G159 tire's suitability at 65 mph, Musnuff emailed Hancock in June 2008 stating that the whole suitability testing package included: (1) the extended DOT tests, (2) the Heat Rise tests, (3) the bead durability tests, and (4) the crown durability tests. As in this case, in each of the Other G159 Cases, Goodyear engaged in lengthy discovery battles with the plaintiffs before it produced the requested documents. *Woods* and *Bogaert* were ultimately settled, but the amount of the settlements is either held under seal, or not reflected in the record of those cases. As stated above, presumably with the benefit of the Heat Rise tests, *Schalmo* yielded a $5.6 million verdict to the plaintiffs.

The district court considered each of the Sanctionees' conduct in the Other G159 Cases in light of their conduct in the present case, and concluded that "Goodyear and its counsel took positions in other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable."

The district court concluded that sanctions under 28 U.S.C. § 1927 could not reach Goodyear's conduct, and that sanctions pursuant to Rule 11 were unavailable as they should be imposed before a case is closed. Accordingly, relying upon its inherent power, the district court determined that the most appropriate

sanction for "remedying a years-long course of misconduct" would be "to award Plaintiffs all of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request." The district court held that the supplemental responses, in which Goodyear only produced the FMVSS119 DOT tests, "was the first definitive proof that Goodyear was not going to cooperate in the litigation process." The court also noted that while it would be impossible to determine how the litigation would have proceeded if Goodyear had made the proper disclosures, the case more likely than not would have settled much earlier, and the Haegers believe, for considerably more money.

The district court then conducted an exhaustive analysis of the documentation submitted by Plaintiffs concerning the time entries of its attorneys after Goodyear served its supplemental responses to Plaintiffs' First Request, and the extensive objections made by Goodyear and its counsel to these time entries. The district court "spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award," and with painstaking attention to detail, made adjustments based on Goodyear's objections. Ultimately, using the lodestar method, the district court found that the Haegers should be reimbursed $2,741,201.16 in attorneys' fees and costs. The district court determined that Hancock would be responsible for twenty percent of these fees and costs "[b]ased on his relatively limited involvement, but in light of his repeated misstatements and his failure to correct the record once he learned his representations were false." Musnuff and Goodyear were held jointly responsible for the remaining eighty percent of the fees and costs.

The district court also ordered Goodyear "to file a copy of this Order in any G159 case initiated after the date of this Order," with a footnote indicating that "Goodyear may apply to the court hearing the case to be excused from this requirement." The district court concluded that such filings were necessary based on Goodyear's history of engaging in discovery misconduct during every G159 case that had been brought to the court's attention. The court reasoned that by filing the Order in future G159 cases, Goodyear would "alert plaintiffs and the courts" that it has not acted "in good faith in the past when litigating such cases," and give notice of the tests Goodyear had "attempted to conceal in previous cases."

STANDARD OF REVIEW AND JURISDICTION

"The district court's award of sanctions and the amount of the award are reviewed for abuse of discretion." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1108 (9th Cir. 2002) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991)). Since imposing a sanction under its inherent authority "is within the sound discretion of the district court, we will not overturn its decision unless the court committed an error of law or the court's factual determinations were clearly erroneous." *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109 (9th Cir. 2005).

We need not resolve whether a bad faith finding must be supported by clear and convincing evidence, or whether a lesser quantum of evidence suffices, because the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case. *See Lahiri v. Universal Music and Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010).

We have jurisdiction over the Sanctionees' appeals pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. The District Court's Inherent Power

"It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, power which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal citations and quotation marks omitted). The Supreme Court has specifically recognized that the "inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (citing *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238 (1944)).

This inherent power is not limited by overlapping statutes or rules. The Supreme Court explained "that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49. Thus, the Sanctionees' argument that the district court should have relied on Federal Rule of Civil Produce 37 fails.[3]

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[3] Rule 37 provides that "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." If the party fails to comply with a court order, Rule 37 provides the following remedies: Rule 37(b)(2)(A) "If a party . . .fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following: (i) directing that the matters embraced in the order or

While Rule 37 also provides a method to sanction a party for failing to comply with discovery rules, it is not the exclusive means for addressing the adequacy of a discovery response. *See id.*

The Sanctionees also argue that the court cannot impose sanctions in this case because the Haegers failed to move to compel disclosure or discovery under Rule 37, and thus the Sanctionees never violated a district court order compelling disclosure or discovery. More specifically, the Sanctionees contend that absent such a motion to compel or order requiring production, Goodyear and its counsel complied with discovery rules, and thus the district court does not have power

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other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination"; Rule 37(b)(2)(C) "Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

Additionally, if a party fails to disclose or supplement an earlier response, Rule 37(c)(1) states: "If a party fails to provide information . . . the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions . . . ."

to sanction the Sanctionees' conduct. The Supreme Court has expressly rejected this argument. "[N]either is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules . . . if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *Id.* at 50. We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case, and to determine that Rule 37 did not provide the appropriate remedy, especially since the discovery fraud was not discovered until after the case had settled.

A. Bad Faith

Before awarding sanctions pursuant to its inherent power, "the court must make an express finding that the sanctioned party's behavior 'constituted or was tantamount to bad faith.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006). We have found bad faith in a variety of conduct stemming from "a full range of litigation abuses." *Chambers*, 501 U.S. at 47. For example "[a] party 'demonstrates bad faith by delaying or disrupting the litigation . . . .' *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)." *Leon*, 464 F.3d at 961 (plaintiff demonstrated bad faith by going to extraordinary measures to destroy evidence).

Actions constituting a fraud upon the court or actions that cause "the very temple of justice [to be] defiled" are also sufficient to support a bad faith finding. *Chambers*, 501 U.S. at 46. For example, in *Pumphrey v. K.W. Thompson Tool Company*, the decedent's family brought a wrongful death action

against a gun manufacturer after the decedent dropped the manufacturer's gun with the safety devices engaged and it fired, killing the decedent. 62 F.3d 1128, 1130 (9th Cir. 1995). During trial, the manufacturer introduced tests showing that when the gun was dropped, the safeties performed as designed and the gun never fired. *Id.* After the trial concluded, Plaintiffs' attorney learned that in a subsequent, unrelated lawsuit, the manufacturer had produced tests during which the gun had fired when dropped. *Id.* These tests had not been produced during Plaintiffs' litigation even though they were available two months before trial, and despite the manufacturer's assurance that gun tests would be made available upon their discovery. *Id.* at 1131. The manufacturer also affirmatively mischaracterized the nature of these tests during later discovery, and introduced testimony during trial that it had never seen the gun fire when dropped. *Id.* at 1132. Plaintiffs moved to set aside the trial verdict, pursuant to Federal Rule of Civil Procedure 60(b). *Id.* at 1130. We upheld the district court's grant of a new trial finding that the manufacturer had "engaged in a scheme to defraud the jury, the court, and [the Plaintiffs], through the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impressions created . . . ." *Id.* at 1132. We further held that the "end result of the scheme was to undermine the judicial process, which amounts to fraud upon the court." *Id.* (citing *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 332 U.S. 238, 245–46, 250 (1944) (deliberately planned scheme to present fraudulent evidence constitutes fraud upon the court); *Abatti v. C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988) (fraud upon the court involves unconscionable plan or scheme to

influence the court improperly)). While the procedural posture of *Pumphrey* differs from the one in this case, the similarities with this case support the conclusion that the district court did not abuse its discretion in concluding that Sanctionees engaged in fraud upon the court in their scheme to avoid their discovery obligations.

In *B.K.B. v. Maui Police Department*, we found "counsel's reckless and knowing conduct" to be "tantamount to bad faith and therefore sanctionable under the court's inherent power." 276 F.3d 1091, 1108 (9th Cir. 2002) (emphasis in original). *B.K.B.* was a sexual harassment suit, in which defense counsel introduced testimony in violation of Federal Rule of Evidence 412.[4] Defense counsel introduced this testimony after two Rule 412 pre-trial motions had been denied, and after he assured the district judge in a sidebar that the anticipated testimony would not violate Rule 412. *Id.* at 1107. We concluded that "defense counsel's introduction of [the] testimony was a knowing and intentional violation of Rule 412" and further held that "[i]f left unsanctioned, defense counsel's behavior in this case would undermine the very purpose and force of Rule 412's strictures." *Id.* at 1108. In this case, the district court did not abuse its discretion in concluding that the Sanctionees' failure to produce relevant documents despite their affirmative obligations to do so pursuant to Rules 26 and 34, and their misrepresentations in numerous discovery disputes (which

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[4] Rule 412: "(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition."

the district court estimated took "approximately sixteen hours in court"), was tantamount to bad faith. The Sanctionees' conduct in this matter undermines the very purpose of the federal rules requiring disclosure of relevant and responsive documents.

It is clear the district court did not abuse its discretion in concluding that Hancock, Musnuff, and Goodyear acted in bad faith in this litigation. The Sanctionees, throughout numerous discovery dispute filings and hearings, convinced the district court that Goodyear had produced all test data relevant to the Haegers' claims. The district court noted that "[i]n fact, at various points the Court became exasperated with Plaintiffs' apparently unsubstantiated claims that additional information must exist." It was not until the sanctions proceedings that the district court realized that the Sanctionees had

> adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior.

The Haegers served their First Request in September 2006. The Sanctionees merely objected to this request, and did not produce any documents. The Sanctionees then filed supplemental responses in November 2006, which included the production of only one group of tests – the FMVSS119 DOT tests. It was not an abuse of discretion for the district court to find that production of just one group of tests meant that the Sanctionees had failed to search properly for

relevant G159 tests in response to the Haegers' First Request, and had done so in bad faith.

The Sanctionees then failed to disclose promptly relevant G159 tests after a proper search had been conducted. Musnuff and Hancock had the High Speed tests in their possession at the latest in February 2007, yet failed to disclose promptly the High Speed tests to the Haegers. Instead, the Sanctionees chose to depose the Haegers' expert in May 2007, and then produce the High Speed tests in June 2007. Musnuff was next aware of more tests – including the Heat Rise tests, DOT endurance tests, crown durability tests, and bead durability tests — at least by August 2007, and Hancock was aware of these same tests at least by June 2008. However, the Sanctionees again failed to disclose properly these tests upon their discovery. Without producing any of these additional tests, Goodyear settled with the Haegers in April 2010.

The district court concluded that the Sanctionees should have turned over the High Speed tests, Heat Rise tests, DOT endurance tests, crown durability tests, and bead durability tests as soon as they were discovered, as they were all responsive to the First Request. The district court did not abuse its discretion in concluding that this decision to withhold documents "was a bad faith attempt to hide responsive documents," which would not have been uncovered but for the sanctions proceedings. This finding of bad faith is bolstered by Hancock's repeated representations to the district court that Goodyear was complying with all discovery requests when in fact, Goodyear was withholding relevant and responsive documents.

Any attempt by Goodyear to argue that the district court abused its discretion in preventing Goodyear

from passing the blame on to its attorneys is unavailing. Goodyear "is deemed bound by the acts of [its lawyers] and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962); *see also Lockary v. Kayfetz*, 974 F.2d 1166, 1169–70 (9th Cir. 1992). Additionally, the district court did not abuse its discretion in concluding that Goodyear participated directly in the discovery fraud: Goodyear's Rule 30(b)(6) witness, authorized to testify on Goodyear's behalf, falsely testified during deposition that no additional tests were available beyond the High Speed tests that had been turned over to the Haegers; and Goodyear's in-house counsel, Okey, maintained responsibility for reviewing and approving all the incomplete and misleading discovery responses.

We hold that it was not an abuse of discretion for the district court to find that Hancock, Musnuff and Goodyear each acted in bad faith.

B. Monetary Sanctions

Once a district court makes a finding of bad faith, it has the discretion to "award sanctions in the form of attorneys' fees against a party or counsel.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)). "A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO*, 501 U.S. 32, 44–45 (1991).

In its analysis of sanctions, the district court noted that due to the extent of the bad faith of the Sanctionees in this case, had the misconduct "come to light while the case was ongoing, entry of default

judgment with a trial on damages would have been the obvious solution." However, since the case was settled and closed before the misconduct was discovered, the court instead was faced with the task of determining the appropriate amount of sanctions to make the Plaintiffs whole in the form of attorneys' fees and costs. The court found that the Sanctionees had engaged in a "years-long course of misconduct," which had made it difficult for the court to "separate the fees incurred due to legitimate activity from the fees and costs incurred due to Goodyear's refusal to abide by clear and simple discovery obligations." The court explained that "if Goodyear had responded to Plaintiffs' First Request with all responsive documents, Goodyear might have decided to settle the case immediately," and thus it was possible to "conclude practically all of Plaintiffs' fees and costs were due to misconduct." The district court concluded that "[w]hile there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith, based on Goodyear's pattern and practice in G159 cases, the case more likely than not would have settled much earlier." Thus the district court was informed in part by past settlement practices of Goodyear in the Other G159 Cases in reaching its determination concerning appropriate compensatory damages in this case. The district court then determined, relying upon the reasoning in *Chambers*, that while "[i]t is difficult to reconcile *Chambers* with . . . *Miller*," "the most appropriate sanction is to award Plaintiffs all of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request" as this "was the first definitive proof that Goodyear was not going to cooperate in the litigation process." The district court held that "in these unique

circumstances, it is inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct; proving that linkage is an almost impossible task given how the misconduct permeated the entirety of this case."

The Sanctionees claim that this determination was made in error because sanctions must be directly linked to damage caused by its bad faith conduct, citing *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011). The Sanctionees' confidence in *Miller* is misplaced, for at least two reasons: (1) to the degree *Miller* can be read to require that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct, it flouts controlling United States Supreme Court case law; and (2) under *Chambers*, the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to compensate the Plaintiffs for the damages they suffered as a result of Sanctionees' bad faith.

The panel majority's opening paragraph in *Miller* characterized the case as follows: "This is a strange case. Its resolution hinges on the absence, as a factual matter, of something we must accept as a legal matter. There are unlikely to be many more like it, so this opinion's precedential value is probably limited." *Id.* at 1026. What was missing? The answer: bad faith, an essential requirement for invoking the district court's inherent powers. *Miller* was a wrongful death suit brought against the City of Los Angeles, its police department, police chief, and a sergeant who shot and killed the decedent. The district court "issued an in limine order precluding defendants from arguing that the decedent was armed when he was shot." *Id.* at

1026. The district court found that during the trial's summation, defense counsel violated its in limine order by stating that before decedent was shot, decedent had shot another man, and awarded sanctions under its inherent power for the entire cost of the trial after the jury hung. Counsel conceded that he had violated the court's order, and even apologized for his error, but the district court nevertheless construed counsel's conduct as "tantamount to bad faith," granted plaintiffs' motion for sanctions, and sanctioned defendants $63,687.50. *Id.* There was just one problem. A careful review of the record showed that counsel hadn't actually violated the court's in limine order, despite his confession that he had done so. That put the majority of our panel into a quandary. What should one do about a lawyer who confesses a nonexistent error? In this case, the panel majority concluded that it was bound by what the lawyer had confessed, but that since the lawyer had not conceded bad faith, and clearly had not actually violated the court's order, there could be no finding of bad faith. Put another way, "you can't have a bad faith violation without a violation." *Id.* at 1029. The case was over, since a district court cannot use its inherent power to sanction a party without a finding of bad faith.

But even the subsequent analysis in *Miller* is of little help to the Sanctionees here. *Miller* addressed whether the district court linked the alleged bad faith conduct to the harm suffered, i.e, whether the district court found that the attorney's alleged statement caused the jury to hang. The panel concluded that "without a finding that [defense counsel's violation] caused the first jury to hang, the district court had no power to order defendants to compensate plaintiffs for the attorneys' fees and costs they spent on the first trial." *Id.* Thus, while *Miller* suggests that harm is

necessary to compensate a party, *Miller* makes no holding on the measure of attorneys' fees allowed once it is clear that the bad faith of a party has actually caused harm.[5] In this case, however, there is no doubt that the Sanctionees' bad faith conduct caused significant harm in forcing the Haegers to engage in sham litigation, and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses of the Sanctionees, as found by the district court in light of Goodyear's conduct in the Other G159 Cases.

Even though *Miller* does not provide an answer, we next consider how close a link is required between the harm caused and the compensatory sanctions awarded when a court invokes its inherent power. The question is squarely answered by *Chambers v. NASCO, Inc.*, the Supreme Court's strongest statement about the use of a court's inherent power. 501 U.S. 32 (1991). In *Chambers*, the Supreme Court upheld a district court's determination that "full attorney's fees were warranted due to the frequency and severity of [the party]'s abuses of the judicial system." 501 U.S. at 56. The underlying action in *Chambers* was a suit by NASCO seeking Chambers's specific performance of an agreement to sell a television station's facilities and broadcast license to NASCO. Chambers responded to the suit by attempting to put the properties at issue

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[5] *In re Dyer*, 322 F. 3d 1178 (9th Cir. 2003), also cited by the panel, involved the violation of an automatic stay in bankruptcy, and a purported sanctions award based on the bankruptcy court's statutory contempt power, granted by 11 U.S.C. §105(a). Our panel found that a bankruptcy court has no authority to impose a non-compensatory "serious punitive" sanction. *Id.* at 1195. This holding, of course, has no bearing on this case. *B.K.B. v. Maui Police Dep't*, 276 F. 3d 1091, 1109 (9th Cir. 2002) also referenced by the *Miller* panel, is discussed *infra*.

beyond the reach of the district court through various transfers, ignoring the district court's preliminary injunction, filing meritless motions and pleadings, attempting to conduct depositions in violation of the Federal Rules of Civil Procedure, and engaging in other behavior aimed at frustrating the possibility of specific performance. The district court found these actions to be "part of a sordid scheme of deliberate misuse of the judicial process designed to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Id.* at 57 (internal quotation marks omitted).

The district court then awarded NASCO an amount "which represented the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. The Supreme Court dismissed Chambers's argument, which was virtually identical to the causation requirement claim the Sanctionees are making in this case, that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong," and instead upheld the district court's conclusion "that full attorney's fees were warranted due to the frequency and severity of Chambers's abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." *Id.* at 57. The Supreme Court further explained that it was within the district court's discretion to "compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* The Supreme Court reasoned that the district court "imposed sanctions for the fraud [Chambers] perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of litigation." *Id.* at 55 (internal citations and quotation marks omitted). And, such sanctions both "vindicat[e] judicial authority without resort to

the more drastic sanctions available for contempt of court and mak[e] the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 46 (internal citation and quotation marks omitted); *see also Hutto v. Finney*, 437 U.S. 678, 691 (1978). As a United States Supreme Court case, *Chambers* clearly trumps *Miller*, to the degree *Miller*'s dicta conflicts with *Chambers*, as well as any other Ninth Circuit case to the contrary. Thus, even though the district court in this case struggled with how to reconcile *Miller* with *Chambers*, it appropriately awarded the Haegers all their attorneys' fees and costs in prosecuting the action once the Sanctionees began flouting their clear discovery obligations and engaging in frequent and severe abuses of the judicial system.

Given the teaching of *Chambers*, the district court's findings and ruling in this case regarding monetary sanctions fully comply with law. First, the Supreme Court expressly rejected the linkage argument made by the Sanctionees here when it upheld the award for full attorney's fees "due to the frequency and severity of Chambers's abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." *Chambers*, 501 U.S. at 57. Secondly, it made clear that we review the district court's determinations in arriving at the proper measure of compensatory damages for abuse of discretion. *Id.*

The district court here used the lodestar method to calculate the appropriate amount of fees incurred as a result of the Sanctionees' bad faith, and noted that this "method contemplates multiplying the 'reasonable hourly rate' by the number of hours 'reasonably expended.' *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996)." The district court then went to great lengths in reviewing the "240 pages of time

entries" submitted by the Haegers, and the combination of objections by Goodyear and its attorneys to "[a]lmost every time entry" to ensure "the appropriate size of the award." In a nineteen-page order, the district court addressed each objection made by the Sanctionees to the court' s proposed award, and made five adjustments based on these objections: 1) "out of an abundance of caution," the district court imposed a twenty percent reduction of $29,310 for recreation of time entries; 2) the district court held that because some of the time entry descriptions were vague and/or incomplete, it could not conclude that this time was reasonably expended absent the appropriate information, and reduced the award by $32,117; 3) the district court reduced the award by $4,880.73, equaling the costs for which the Haegers did not submit supporting documents; 4) the district court subtracted $50,721 for time entries involving work of a clerical nature; and 5) the district court found that $25,827.50 should be reduced for excessive billing. Applying these adjustments, the district court awarded the amount the court reasonably believed it cost the Haegers to litigate against a party and attorneys during the time when that party and those attorneys were acting in bad faith. Nothing more is required under *Chambers* or our case law, and, especially given the great care with which the court reviewed the relevant data during its consideration of legal fees, the court clearly did not abuse its discretion.

Our dissenting colleague suggests that *Chambers*'s control over this case was undermined by *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821(1994), and our own *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F. 3d 1128 (9th Cir. 2001). He also suggests that the district court's sanctions in this case were

punitive, not compensatory. With due respect, our colleague is mistaken on both counts. *Bagwell* involved a criminal contempt proceeding stemming out of a protracted labor strike, in which a union was found to have violated the trial court's orders hundreds of times, as determined in eight separate contempt hearings. Although the trial court labeled the over $64 million it levied in fines against the union "civil and coercive," *Bagwell*, 512 U.S. at 824, once the union and the companies settled their labor dispute, and moved to vacate the contempt fines, the trial judge refused to do so, declaring that they were "payable in effect to the public." *Id.* at 825. The Supreme Court appropriately treated the fines as punishment for "criminal contempt," and required courts to provide additional protections to the defendants in such cases. *Id.* at 826. However, even though *Chambers* had been decided only 3 years before by the Supreme Court, *Bagwell* did not even mention *Chambers*, let alone overrule or distinguish it. Contrary to the facts in this case, the Court noted:

> [N]either any party nor any court of the Commonwealth has suggested that the challenged fines are compensatory. At no point did the trial court attempt to calibrate the fines to damages caused by the union's contumacious activities or indicate that the fines were to compensate the complainant for losses sustained. The nonparty governments, in turn, never requested any compensation or presented any evidence regarding their injuries, never moved to intervene in the suit, and never actively defended the fines imposed.

Id. at 834 (internal citation and quotation marks omitted).

F.J. Hanshaw, also cited by our dissenting colleague, is extremely helpful in confirming the validity of the compensatory damages awarded in this case. *F.J. Hanshaw* involved a dispute between two wealthy brothers about a partnership dissolution. 244 F.3d at 1132. Just as a court-appointed receiver was about to render an accounting to the court, one of the brothers, Frederick J. Hanshaw (FJH), allegedly offered the receiver a bribe of $100,000, as well as future business. *Id.* at 1132–33. When the attempted bribe came to the attention of the district court, the court referred the matter to the FBI, which, after conducting several interviews, decided not to proceed with formal criminal charges against FJH. *Id.* at 1133. Thereafter, the district court conducted two evidentiary hearings to determine whether FJH had attempted to defraud the court and his brother. *Id.* at 1133–34. After weighing the evidence, the court concluded that there had been an attempt by FJH to bribe the receiver, and sanctioned FJH and his corporation $500,000, payable to the United States, and imposed a $200,000 sanction against them in favor of his brother, Gordon Hanshaw (GH). *Id.* at 1135. Relying on *Bagwell*, our court found that the $500,000 sanction was "clearly punitive and intended to vindicate the court's authority and the integrity of the judicial process. The sanction was a substantial 'flat, unconditional fine'; was not intended to compensate [GH] but rather was made payable to the United States . . . ." *Id.* at 1138. Since the $500,000 sanction was found to be punitive in nature, we reversed the district court because FJH and his corporation did not receive all the procedural protections to which they were entitled. *Id.* at 1139–40, 1145.

However, we upheld the district court's $200,000 sanction in favor of GH, despite FJH's contention that it too was criminal in nature and should be vacated.

Id. at 1142, 1145. We noted that: (a) "[u]nlike a punitive sanction, particularly one that is payable to the government or the court, a compensatory award payable to a party does not place the court in a prosecutorial role"; (b) "[w]hen determining whether and how much to compensate a party, the court sits in the same adjudicatory position it does when it resolves most disputes. Although the court has an institutional interest in the matter, the court in essence is resolving a dispute between litigants: one party claims it was wronged by the other and wants to be reimbursed by the losses it sustained. For these reasons, when the court is adjudicating a compensatory civil sanction, the traditional procedural protections applicable to civil proceedings are sufficient to satisfy the Constitution's requirement of due process"; (c) in concluding that the $200,000 award to GH was compensatory, we reasoned that "[t]he award was payable to [GH] . . . and was meant to offset the expenses he incurred because of [FJH's] misconduct. As a result of the bribe attempt, the entire receivership process was delayed by nearly six months and [GH] was forced to incur additional attorney fees. The court had before it the billing reports from [GH's] attorneys and [GH] had asked the court for $824,000 in compensation . . . . Exercising its discretion, the court awarded $200,000 to [GH]"; and (d) "[b]ased upon this record, we conclude that the $200,000 award was intended to compensate [GH] for losses sustained as a result of [FJH's] misconduct and is civil in nature." *Id.* at 1142 (citing *Chambers*, 501 U.S. at 56–58).

Just like the district court did in *F.J. Hanshaw* in its $200,000 award to GH, the court here responded to a complaint filed by the Plaintiffs seeking damages for the Sanctionees' bad faith, and awarded as compensatory damages the amount of the attorneys' fees

and costs it carefully determined the Haegers had actually incurred litigating against the Sanctionees, during the time they were acting in bad faith.

"[W]hether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved," meaning a civil sanction is "for the benefit of the complainant," while a criminal sanction is "punitive, to vindicate the authority of the court." *Bagwell*, 512 U.S. at 827–28 (internal quotations omitted). A fine is almost always civil it if "compensate[s] the complainant for losses sustained," *Id.* at 829 (internal quotations omitted), whereas it is generally punitive in nature when it "was not intended to compensate [the party] but rather [is] made payable to the United States." *F.J. Hanshaw*, 244 F.3d at 1138. Other Ninth Circuit cases affirm these points. In *B.K.B. v. Maui Police Department*, the district court found that the sanctionees had acted in bad faith in violating the Federal Rules of Evidence while questioning a witness about the Plaintiff during trial, and awarded "$5,000 to compensate Plaintiff for the pain and suffering caused by the public embarrassment resulting from [the] testimony." 276 F.3d 1091, 1099 (9th Cir. 2002). We upheld the sanction, holding that "the amount the court imposed reflected its assessment of the actual harm incurred by Plaintiff . . . [in] emotional and reputational damage." *Id.* at 1109. Because the district court imposed the sanctions for the purpose of compensation, they were within its discretion.

The district court in *Lasar v. Ford Motor Company* imposed monetary sanctions to compensate "for unnecessary costs and attorney's fees." 399 F.3d 1101, 1111 (9th Cir. 2005). In *Lasar*, the sanctionees' attorney violated pretrial orders during his opening statement, and the court granted Lasar's motion for

mistrial and discharged the jury. *Id.* at 1106. The district court then instructed "Lasar's attorneys to prepare an affidavit detailing Lasar's costs and attorney's fees incurred over the previous two weeks." *Id.* While it is unclear why the district court determined that Lasar should be compensated for two weeks of attorney's fees, the sanctions were upheld as we determined that "[t]he monetary sanctions imposed . . . were compensatory in nature because they were designed to compensate Lasar for unnecessary costs and attorney's fees." *Id.* at 1111. Thus, it was within the district court's discretion to determine the time frame in which Lasar sustained "losses."

Collectively, these cases make clear that the sanctions awarded here were entirely lawful and appropriate. Not one dime was awarded to the government or the court. Just like the district court in *F.J. Hanshaw*, the district court here awarded compensatory damages after the aggrieved party filed suit, or filed a motion, seeking compensation for damages suffered as a result of the bad faith of the opposing party. In awarding compensatory damages, the district court did not act as a prosecutor, but instead allowed the accused and accusing parties to file extensive briefs, and held extensive hearings to determine the truth of what had happened. It took great care in parsing and reducing the attorney fee claims of the Plaintiffs. The accused were granted full due process and afforded all the protections required in civil sanctions hearings. While the district court had an institutional interest in the proceedings (just like the district court did in *F.J. Hanshaw*), its stated purpose was to properly compensate the Plaintiffs for damages they suffered as the result of the Sanctionees' fraudulent conduct. In sum, the district court acted well within its discretion in awarding all the attorneys' fees and costs incurred

by the Plaintiffs after Goodyear served its supplemental responses to Plaintiffs' First Request.

C. Non-Monetary Sanctions

The district court also used its inherent power to order Goodyear to file a copy of the Order in any G159 case initiated after the date of that Order. The district court reasoned that "[b]ased on Goodyear's history of engaging in serious discovery misconduct in every G159 case brought to this Court's attention, filing this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in the past, not operated in good faith when litigating such cases." The district court found that this would "serve as a notice of the existence of certain tests Goodyear attempted to conceal in previous cases." The district court did not limit this requirement in either time or scope. Goodyear argues that this sanction is too severe as it impacts the fairness of unrelated proceedings, and thus should be reversed as an abuse of the district court's discretion.

Courts have the inherent power to impose various non-monetary sanctions. *See Thompson v. Hous. Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (inherent power includes power to "impose sanctions including, where appropriate, default or dismissal"); *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995) (dismissal pursuant to inherent powers); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming order striking answer and entering default judgment). However, even if a given sanction is available, the scope of the sanction must also be appropriate. *Lewis v. Tel. Emps. Credit Union*, 87 F.3d 1537, 1558 (9th Cir. 1996). A sanction should be "carefully fashioned to deny [the

party] the fruits of its misconduct yet not to interfere with [the party's future rights]." *Id.*

In *Hale v. U.S. Trustee*, a bankruptcy court imposed a sanction that regulated future conduct "in response to specific and repeated acts of incompetent and irresponsible representation." 509 F.3d 1139, 1149 (9th Cir. 2007). The court found a bankruptcy attorney to be "[u]nable or unwilling to conform his conduct to the requirements established by the Court's prior decisions and ruling, and to the standards by which all other debtors' counsel in the District abide." *Id.* at 1145. We upheld the bankruptcy court's sanction which required that the attorney "not file, nor shall he prepare or cause to be prepared for filing by a debtor, any bankruptcy petitioner unless [the attorney] signs said petition." *Id.* Additionally, the attorney was directed not to file, nor assist a debtor as counsel in filing, "any bankruptcy petition unless [the attorney] commits to such debtor to meet the ethical and professional obligations of a debtor's attorney and provide the reasonable and necessary services required to properly represent a debtor in a bankruptcy case." *Id.* Thus, this chosen sanction regulated the attorney's practice and specific actions that the attorney was required to take with all future clients. We held that "[u]nder the specific acts of this case, we cannot say that the bankruptcy court abused its inherent power to impose sanctions." *Id.* at 1149.

We are persuaded by the reasoning of *Hale*. We are also persuaded by the reasoning of *Gallop v. Cheney*, a Second Circuit case F.3d 226 (2d Cir. 2012). The Plaintiff's claims in *Gallop* addressing the same issue. 667 were dismissed by the district court as frivolous, and the Second Circuit affirmed the dismissal on appeal. *Id.* at 228. The Second Circuit

then ordered Plaintiff and her counsel, including Dennis Cunningham, to show cause why the Court should not impose sanctions for what it held to be a frivolous appeal. In response, Plaintiff moved to "disqualify the three members of the panel from considering her petition for rehearing and rehearing in banc." *Id.* The Court sanctioned Plaintiff's counsel for filing a frivolous appeal, and then imposed additional sanctions for filing the frivolous motion to disqualify. *Id.* at 230. The Court held that "Cunningham acted in bad faith in demanding the recusal of the three panel members and any like-minded colleagues," and ordered Cunningham to "provide notice of the sanctions imposed upon him in this case . . . to any federal court in this Circuit before which he appears or seeks to appear" for a period of one year. *Id.*

The district court here imposed the non-monetary sanction so that future plaintiffs and courts would be alerted that Goodyear had previously not operated in good faith, and so that future plaintiffs would be aware of the types of G159 tests available. We agree with the district court's reasoning, particularly in light of the fact that it is highly likely that most future G159 litigation will be filed in state courts (*see, e.g.*, the Other G159 Cases), and state court counsel will not necessarily investigate what might be contained in the Federal Reporter about the conduct of Goodyear and its counsel. We note also that the district court provided a form of safety valve in its non-monetary sanctions because "Goodyear may apply to the court hearing the case to be excused from [the requirements of the Order]."

We find that the district court's imposition of non-monetary sanctions against Goodyear is balanced,

is narrowly tailored, and imposes no sanctions beyond what is necessary to remedy what the district court properly perceived as an ongoing problem in Goodyear's G159 litigation. The district court did not abuse its discretion in imposing non-monetary sanctions on Goodyear.

CONCLUSION

For the reasons noted in this opinion, we hold that the district court did not abuse its discretion in imposing sanctions in the sum of $548,240 against Hancock, and $2,192,961 jointly against Musnuff and Goodyear. The district also did not abuse it discretion in imposing non-monetary sanctions against Goodyear.

We affirm the monetary and non-monetary sanctions set forth in the district court's Order.

The Sanctionees shall bear all costs in this appeal.

AFFIRMED.

WATFORD, Circuit Judge, dissenting:

Goodyear and its lawyers were accused in this case of perpetrating a fraud on the Haegers and the court. If sustained, those charges could of course severely damage the professional reputations of the lawyers involved. The district court accordingly approached the task of determining whether the charges were true with great thoroughness and care. After conducting a lengthy evidentiary hearing and reviewing multiple rounds of briefing, the court concluded that Goodyear and its lawyers acted in bad faith when they failed to produce test results that were responsive to the Haegers' document requests. I agree with the majority that the district court's misconduct findings are supported by the record, but I nevertheless conclude that the $2.7 million sanctions award must be vacated.

The district court's finding of bad faith authorized it to levy sanctions under its inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Those sanctions could have taken one of two forms: punitive sanctions, which are criminal in nature and intended to vindicate the authority of the court; or compensatory sanctions, which are civil in nature and designed to compensate the injured party for losses sustained as a result of the misconduct. *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029–30 (9th Cir. 2011); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1136–42 (9th Cir. 2001).[1]

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[1] Sanctions may also be civil in nature if they are "designed to compel future compliance with a court order." *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 (1994). The sanctions imposed here could not serve that function because the litigation between the Haegers and Goodyear had long since ended.

The district court chose not to impose punitive sanctions. Doing so would have required the court to follow procedures applicable in criminal cases, such as appointing an independent prosecutor, affording the accused the right to a jury trial, and demanding proof of misconduct beyond a reasonable doubt. *Miller*, 661 F.3d at 1030. Compensatory sanctions, by contrast, may be imposed by the court acting alone after providing adequate notice and an opportunity to be heard. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir. 2005). That is the route the district court chose to follow here. The question for us is whether the court correctly labeled the sanctions compensatory. If it did not—if the sanctions are instead punitive—they cannot stand. *See Miller*, 661 F.3d at 1029–30; F.J. Hanshaw, 244 F.3d at 1141–42.

In my view, the $2.7 million sanctions award cannot be deemed compensatory. The award could be compensatory only if the record reveals a causal connection between the misconduct the court found and the amount it awarded. *See Miller*, 661 F.3d at 1029–30. The $2.7 million award represents all of the attorney's fees incurred by the Haegers after Goodyear breached its discovery obligations, including fees for the years of litigation that ensued before the parties settled on the first day of trial. The court purported to find the necessary causal link between the misconduct and the fees awarded on the theory that, if Goodyear had produced the test results when it was supposed to, "the case more likely than not would have settled much earlier." I do not think that finding is supported by the record.

Our decision in *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011), illustrates the deficiency. In that case, the district court found that defense counsel

violated an in limine order by suggesting during closing arguments that the decedent was armed when the defendant police officer shot him. *Id.* at 1026. The trial ended in a hung jury. The district court awarded the plaintiffs all fees incurred during the trial as a compensatory sanction, presumably on the theory that defense counsel's improper closing argument caused the jury to hang, thus necessitating a retrial and rendering all of the fees incurred during the first trial a waste. We concluded that the award could not be deemed compensatory. *Id.* at 1030. The record did not establish a causal connection between the lawyer's misconduct and the jury's inability to reach a verdict. It was simply impossible to know, on the record compiled in that case, why the jury could not reach a verdict, and the limited evidence available suggested that it was not because of defense counsel's improper remarks. *Id.*

The record in this case is similarly devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded. It's anyone's guess how the litigation would have proceeded if Goodyear had disclosed all responsive test results from the start. The case might have settled right away, as the district court assumed, but that seems unlikely. The test results did not provide conclusive proof that the Haegers' tire failed due to its defective design. To be sure, the test results were favorable to the Haegers: The results supported the Haegers' theory that Goodyear sold tires that were prone to failure when used on motor homes at highway speeds, especially in hot driving conditions like those prevailing at the time of the Haegers' accident in Arizona. But even if those test results had been put before the jury, Goodyear still planned to argue that the Haegers' own tire, which had endured more than 40,000 miles of wear

and tear, failed because it struck road debris, not because the tire was defective. And Goodyear has consistently maintained (whether rightly or wrongly) that the test results it concealed do not accurately predict tire behavior in real-world driving conditions.

If anything, it seems more plausible to assume that the case would have proceeded to trial had the test results been timely disclosed. The Haegers' grievance is that they accepted a low-ball settlement from Goodyear on the eve of trial under false pretenses. The concealed test results, they contend, would have significantly strengthened their hand. That suggests the Haegers would have been willing to take their case to the jury if Goodyear had refused to increase its offer, but it does not suggest that Goodyear would have thrown in the towel and met the Haegers' demands. In fact, the only relevant data point in the record supports the opposite conclusion. In the *Schalmo* case, one of the other motor home accident suits involving the same allegedly defective tire, Goodyear produced the test results at issue, but the plaintiffs and Goodyear elected to take the case to trial (with the jury returning a sizeable verdict for the plaintiffs). Goodyear did not settle that case immediately upon disclosure of the test results, as the district court assumed would have happened here.

In short, we simply don't know—and have no way of reliably figuring out—what would have happened if timely disclosure of the test results had occurred. Thus, I think the district court clearly erred in finding that "the case more likely than not would have settled much earlier" had Goodyear disclosed the test results when it should have.

The majority does not contend that a causal connection between Goodyear's misconduct and the fees

awarded has been shown here, as required for the sanctions to be deemed compensatory. The majority instead contends that *Miller*'s causation requirement "flouts controlling United States Supreme Court case law." Maj. op. at 30. I don't think that's true. *Miller*'s discussion of causation did not break new ground; it simply reflects the well-established principle, fully consistent with Supreme Court precedent, that a sanction can be deemed compensatory only if it compensates the injured party for losses sustained *as a result of* the sanctionable misconduct. *See, e.g.*, *Lasar*, 399 F.3d at 1111; *F.J. Hanshaw*, 244 F.3d at 1142. What we said about causation in *Miller* merely illustrates why the fees awarded in this case were not sustained *as a result of* Goodyear's misconduct.

The majority reads *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), as establishing a competing principle: that a fee award may be deemed compensatory even if the fees were *not* incurred as a result of the sanctionable misconduct, so long as the misconduct involves "frequent and severe abuses of the judicial system." Maj. op. at 32. The majority assumes that principle must be valid because, in its view, not all of the fees awarded to NASCO were incurred as a direct result of Chambers' misconduct.

I see two problems with the majority's reading of *Chambers*. First, it is by no means clear as a factual matter that the majority's reading is correct. The district court in *Chambers* expressly held that Chambers' misconduct began even before NASCO formally filed suit. After Chambers informed NASCO that he would not honor the agreement to sell his local television station, NASCO gave Chambers notice on a Friday that it intended to file suit the following Monday seeking specific performance. That advance

notice was required by court rules because NASCO also intended to seek a temporary restraining order preventing Chambers from disposing of the station pending resolution of the suit. 501 U.S. at 36. Rather than acknowledge that he had no valid defense to the suit, and that he therefore had no business putting NASCO to the expense of filing it, Chambers embarked on what turned out to be a years-long campaign of bad-faith litigation misconduct, beginning with his efforts over the weekend to fraudulently transfer ownership of the station in order to deprive the district court of jurisdiction. Id. at 36–37. Because the district court found that Chambers never had a good-faith basis for resisting the relief NASCO sought, and that all of the actions he took in "defending" the suit were aimed solely at obstructing and delaying the inevitable sale of the television station, it seems fair to say that all of NASCO's attorney's fees were incurred as a direct result of Chambers' misconduct. *See id.* at 50–51.

Second, even if some portion of NASCO's attorney's fees were *not* incurred as a direct result of Chambers' misconduct, the majority incorrectly assumes that the Supreme Court upheld the award as purely compensatory. The sanction imposed there was not purely compensatory; it served the "dual purpose" of (1) vindicating the court's own authority and (2) "mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 46 (internal quotation marks omitted). The first of these purposes, we have subsequently held, is the domain of punitive sanctions, and the Court in *Chambers* left no doubt that punishment was indeed a key purpose of the sanctions imposed in that case. *See id.* at 55 n.17 ("the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also

the harm done to the court itself"). Because it was partly punitive, the sanctions award did not need to be limited to fees directly caused by Chambers' misconduct.

I concede that the district court imposed the sanctions in *Chambers* without applying the heightened procedural protections we have subsequently held are necessary before punitive sanctions may be imposed, and that the Supreme Court nonetheless affirmed. I don't think we can read anything into that fact. The defendants in *Chambers* did not raise any due process arguments, and the Supreme Court therefore did not address whether the process afforded the defendants was adequate. Moreover, the law has changed since *Chambers* was decided. A few years later the Court issued *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), the case from which we first derived the rule that imposition of punitive sanctions must be accompanied by the procedural protections applicable in criminal cases. *See F.J. Hanshaw*, 244 F.3d at 1137–38. If any doubts lingered about whether *Chambers* authorizes imposition of so-called "dual purpose" sanctions without following the procedures applicable in criminal cases, we put those to rest in *Miller*. The dissent in *Miller* made that very argument, 661 F.3d at 1039 (Ikuta, J., dissenting), but the panel majority implicitly rejected it. *See id.* at 1030.

None of this is to suggest that compensatory sanctions can't be fashioned at all. There may well be other ways to calculate the losses sustained by the Haegers as a result of the misconduct. For example, the most direct loss the Haegers sustained is that they probably settled their case for less than it was really worth. It might be possible to use the *Schalmo* case,

and others like it if they exist, to calculate the difference between what the Haegers actually received in settlement and what they likely would have received—whether through an enhanced settlement or a jury verdict—if the test results had been disclosed in a timely manner. But going down that path would obviously be fraught with proof problems of its own.

Alternatively, instead of attempting to calculate lost settlement value, the district court could again focus on attorney's fees incurred by the Haegers, limiting the award to fees that can be linked in a non-speculative way to the misconduct. The fees that most readily spring to mind are those wasted on expert discovery that took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist. Those and other fees similarly traceable to the misconduct are no doubt comparatively small, but I don't think the district court was right in suggesting that calculating them would be an impossible task. Those fees can be calculated; it's just that they may produce a sanction smaller than seems warranted given the severity of the misconduct the district court found.

If the sanctions that can properly be deemed compensatory seem too paltry under the circumstances, the district court could still fashion an award of punitive sanctions, so long as it applies the corresponding heightened procedural protections. *See Miller*, 661 F.3d at 1030–31; *F.J. Hanshaw*, 244 F.3d at 1141–42. Because Goodyear and its lawyers were not afforded those protections before punitive sanctions were imposed, I dissent from the majority's affirmance of the $2.7 million award.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 02/24/12]

No. CV-05-2046-PHX-ROS

LEROY HAEGER, et al.,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER CO., et al.,

Defendants.

PROPOSED ORDER

Plaintiffs have filed a Motion for Sanctions. Based on an exhaustive review of the entire record, the following represent the Court's findings of fact and conclusions of law.

BACKGROUND

I. Facts of the Accident and Initial Proceedings

In June 2003, Leroy and Donna Haeger, along with Barry and Suzanne Haeger (collectively "the Haegers"), were traveling in a motor home owned by Leroy and Donna Haeger. That motor home was manufactured by Gulf Stream Coach ("Gulf Stream") on a chassis manufactured by Spartan Motors, Inc. ("Spartan"). The motor home had "G159" tires manufactured by Goodyear Tire and Rubber Company ("Goodyear"). While traveling on the highway, one of the motor home's front tires failed, resulting in the motor home

leaving the road and tipping over.[1] The Haegers suffered serious injuries as a result. The motor home was insured by Farmers Insurance Company.

In 2005, the Haegers and Farmers Insurance Company ("Farmers") sued Gulf Stream, Spartan, and Goodyear. The Haegers and Farmers alleged various product liability and negligence claims. (Doc. 13). Practically no discovery occurred before the parties' first disagreement arose. (Doc. 49). That disagreement centered on whether a protective order should include a provision allowing the Haegers' counsel to "share" information with other counsel litigating claims against Goodyear elsewhere in the country. (Doc. 49). In August 2006, the Court entered a protective order which did not contain a "sharing" provision. (Doc. 56). Shortly after that protective order, the Court issued its first scheduling order. (Doc. 58). The parties then began discovery in earnest.

II. Goodyear's Behavior During Discovery

In September 2006, the Haegers served their First Request for Production of Documents. (Doc. 59). Approximately thirty days later, Goodyear provided its responses followed not long after by supplemental responses. (Doc. 62, 63). Goodyear's supplemental responses started with sixteen "general objections." (Doc. 938-1 at 19). After those objections, Goodyear provided more specific objections for each request. Most relevant here is "Request for Production No. 14." That request was for: "All test records for the G159 tires, including, but no (sic) limited to, road tests,

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[1] The cause of the accident was never determined. Goodyear claimed it was due to driver error while the Haegers claimed it was due to the defective nature of the tire.

wheel tests, high speed testing, and durability testing." Goodyear's response was as follows:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.
>
> SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation, Goodyear will produce, subject to the Protective Order entered in this case, the DOT test data for the Subject Tire for the Subject Time Frame.

(Doc. 938-1 at 24).

In December 2006, the parties notified the Court they had a discovery dispute regarding the permissible scope of discovery. (Doc. 97). In particular, the parties could not agree on the appropriate time frame for Goodyear's document productions. Goodyear believed it should not have to produce any information it received after the date of the accident while Plaintiffs believed Goodyear should have to produce such information. The Court held a hearing to address this disagreement on January 3, 2007. In explaining its position, Goodyear's counsel Graeme Hancock made broad statements indicating that Goodyear had already produced a large amount of information: "We have produced all of the data we had as of the date of the accident so you can say [Goodyear] knew or should have known through negligence [of a problem], or

that's enough data so that if there's some kind of problem in the production, it's obvious." (Doc. 116 at 33). Mr. Hancock went on to clarify that for certain questions in "the first set of interrogatories [and] in the first set of requests of production," Goodyear had no additional information than what it had already produced. (Doc. 116 at 33). Relying on Goodyear's representation that all of the information from before the accident had been produced, the Court heard and resolved the specific types of post-accident information that Goodyear would have to produce. (Doc. 116 at 34-35).

On April 6, 2007, the Court held a status conference. (Doc. 146). During that conference, the Court inquired whether the parties were on schedule to complete discovery by the applicable deadline. Plaintiffs' counsel represented he was on schedule. The Court then asked Mr. Hancock for his opinion on whether all discovery could be completed on time.

> The Court: Let me ask defense counsel, is there any internal documentation that is available that has been requested that your client has — clients have not provided?
>
> Mr. Hancock: You Honor, speaking on behalf of Goodyear, we have responded to all outstanding discovery and those responses have been outstanding for some time and, you know, if a document shows up, we'll of course produce it and supplement our answers but I think we're done or nearly done.

(Doc. 146 at 13).

On April 17, 2007, the parties filed a joint statement of discovery dispute. (Doc. 152). The discovery dispute involved Plaintiffs' attempts to obtain information

from Gulf Stream and Spartan regarding other motor home accidents. Plaintiffs' counsel expressed his belief that this "tire was never tested above 30 miles an hour." (Doc. 201 at 48). Because of this statement, the Court asked a specific question of Goodyear's counsel and received an unequivocal response.

> The Court: Mr. Hancock, are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?
>
> Mr. Hancock: Yes, Your Honor.
>
> The Court: And they have been produced?
>
> Mr. Hancock: No, Your Honor. They have been requested from the plaintiffs in a Request for Production that arrived in my office I believe last week where the discovery response is due in mid-June. And they will be – I have requested them from my client and they will be produced at that time.
>
> The Court: All right. So Mr. Kurtz –
>
> Mr. Kurtz: Your Honor, if I may, we have, as have lawyers across the country, they have asked for these tests. My requests for these speed tests have been outstanding for well over a year and Mr. Hancock himself told me the reason they haven't been produced is because nobody can find them anywhere.
>
> The Court: Well, he's found them. He apparently has found them so you're going to have what you want.
>
> Mr. Kurtz: Well, I'll be looking forward to reading them but that won't change the issue, Your Honor. You know, I think – you know, this is discovery, Judge. We ought to be able

> to ask some questions and I'm pleased to provide the court with a detailed factual record about these. These are not things that I'm making up. They are not things that experts divined. They are tied to hard documents prepared by Goodyear.
>
> The Court: It seems to me that the issue has been narrowed after our lengthy conversation to the tests that have been used or were engaged in by Goodyear for the purpose of establishing for their purposes and for consumers that these tires could be used for – based upon the weight and pressure that they have indicated that they were or that they could hold for traveling above 75 or at 75 miles an hour.

(Doc. 201 at 48-49). After further discussion with counsel regarding the appropriate scope of discovery and depositions, the Court made sure Mr. Hancock understood his obligations.

> The Court: Is there any question in your mind, Mr. Hancock, what I am going to allow in terms of discovery? And that is the deposition questions that I will allow?
>
> Mr. Hancock: Your Honor, I believe the court is saying . . . my witnesses should be deposed about the [testing] done on this [specific] tire with respect to the speed in which it can be operated and what records they have, what records they don't have and what those records show?
>
> The Court: That's exactly right.
>
> Mr. Hancock: Thank you, Your Honor.

(Doc. 201 at 51).

The parties filed a notice of discovery dispute on June 1, 2007. (Doc. 225). That notice recounted a variety of disputes, including a dispute involving Plaintiffs' request that Goodyear provide a 30(b)(6) witness.[2] At the discovery dispute hearing, Plaintiffs began by explaining the main theory of their case:

> Mr. Kurtz: And the tire can't carry the weight of the motor home at [freeway] speed. And it causes the tire to degrade and fail. And we believe – and we're in the middle of this in this case – that that is part of the reason that we saw all these motor home failures with the G159 tire, is that when they get up to freeway speed, they're just not put together to operate in that environment.

(Doc. 243 at 13).

The parties then discussed with the Court the 30(b)(6) issue. Plaintiffs' counsel described the proposed deposition topics as including "the design history of this tire" and "testing for speed and weight." (Doc. 243 at 21). The Court ruled that the 30(b)(6) deposition could occur. (Doc. 243 at 27). The Court also clarified with Goodyear's counsel that the witness would be speaking on behalf of Goodyear. (Doc. 243 at 29).

On June 21, 2007, Goodyear responded to Plaintiff's Third Request for Production of Documents. That request sought "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway

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[2] On May 11, 2007, Plaintiffs noticed a 30(b)(6) deposition of Goodyear. The subjects of that deposition were to include the "history of testing of the subject tire for speed capacity and weight capacity during the years of its production." (Doc. 175 at 4).

purposes." (Doc. 938-1 at 17). Goodyear's response to this request was as follows:

> Subject to and without waiving the following objections, and in a good faith spirit of cooperation, Goodyear states that it is producing, subject to the Protective Order entered in this case, copies of electronically-maintained high-speed durability test results conducted on 275/70R22.5 G159 production tires since August 1996. After diligent search, to date Goodyear has not been able to locate additional paper records for the tests that are recorded electronically and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Also, after diligent search, to date, Goodyear has not been able to locate the paper records for the high-speed durability tests which it conducted on the 275/70R22.5 G159 tire prior to August 1996, which were not recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Goodyear will supplement this response to produce these paper records if they are subsequently located.
>
> Goodyear objects to this Request for the reasons and on the grounds that it is overly broad, unduly burdensome, seeks irrelevant and confidential information.

(Doc. 938-1 at 36).

Around the same time Goodyear responded to Plaintiffs' Third Request for Production of Documents, the Court ordered the parties to "confer and set dates

for all remaining depositions and discovery by June 26, 2007." (Doc. 251). On June 26, 2007, Plaintiffs filed a document stating the parties had complied with the Court's Order by establishing dates to complete discovery. Because a status hearing was scheduled for the near future, Plaintiffs' filing also addressed various discovery problems they were still having with Goodyear. According to Plaintiffs, Goodyear's June 21 disclosures were the "first time" it had disclosed "evidence which relates to the inability of the subject tire to operate at freeway speeds." Plaintiffs stated they were still waiting for Goodyear to produce additional testing information and they requested the Court "inquire and determine whether additional testing data is in Goodyear's possession to assure that Goodyear's disclosures are complete." (Doc. 256 at 3).

On August 9, 2007, the parties filed a joint statement regarding the future of discovery. In that document, Plaintiffs stated they were still attempting "to gather information from Goodyear on the design and testing of this tire." (Doc. 301 at 5). In addition, Plaintiffs claimed "Goodyear did not produce any testing on the speed of the tire until June [21], 2007,[3] despite the fact such testing was requested in Plaintiffs' First Request to Produce on September 20, 2006." (Doc. 301 at 6). In response, Goodyear argued Plaintiffs were attempting to "distract[] the Court with a series of red herrings regarding as yet unpresented and inchoate discovery disputes." (Doc. 301 at 7). Goodyear did not provide any substantive response regarding its extremely late disclosure of testing data. Instead, Goodyear argued the discovery deadline had passed and requested the Court limit the amount of remaining

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[3] The exact date of Goodyear's disclosures in June 2007 is unclear.

discovery. Without addressing the testing data issue, the Court imposed new discovery deadlines. (Doc. 311).

On September 10, 2007, the parties submitted another joint statement of discovery dispute. (Doc. 319). Plaintiffs were seeking to brief the issue regarding the "proper scope of discovery." Plaintiffs also wished to present "information that Goodyear improperly withheld high-speed test data from the court." (Doc. 319 at 2). On the issue of test data, Goodyear responded that "Nothing suggests this Court has ever ordered production of any test data to it. Goodyear produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). The Court denied Plaintiffs' request to brief these issues and ordered the parties to comply with prior rulings regarding the appropriate scope of discovery. (Doc. 320).

On September 12, 2007, Plaintiffs deposed Richard Olsen. Mr. Olsen had been designated as Goodyear's 30(b)(6) witness. Mr. Olsen was asked about the "high speed" tests Goodyear performed on the tire prior to Goodyear determining it could be released as a tire able to perform at speeds up to 75 miles per hour. In particular, Mr. Olsen was given the four tests which had been turned over to Plaintiffs in June 2007 and was asked whether they constituted the entire universe of such tests.

> Mr. O'Connor (Plaintiffs' Counsel): To the best of your knowledge, [were] only these four high-speed tests available to Goodyear prior to rating this tire as a 75 mile an hour tire[?]
>
> * * *

Mr. Olsen: No.

Mr. O'Connor: What other high-speed tests are available?

Mr. Olsen: I think we talked at length this morning when we first started getting into the high-speed test data that I've spoken with the people who were involved in the release of this tire, and they've confirmed to me that high-speed tests were run in the development process of this tire before it was released to production. We just don't have any paperwork available for that.

Mr. O'Connor: Okay. So there were tests run, but those have either been discarded or thrown away, and we don't have the results of those tests. Correct?

Mr. Olsen: We don't have them here today, but the people making the decision at that time likely had them available to them at that time.

Mr. O'Connor: Okay. So they had them available, apparently, in 1998 and have somehow discarded them since 1998. Is that what you're trying to tell me?

Mr. Olsen: I'm just saying that they're not available today.

Mr. O'Connor: Okay. So based on the record we have, we only know of four available high-speed tests that we can look at as to whether or not Goodyear could justify speed rating this tire at 75 miles an hour in June of 1998. Correct?

Mr. Olsen: We have four available today to us.

* * *

Mr. O'Connor: Okay. So there's any – any separate testing that would have been done on this car – on this particular tire, sir?

Mr. Olsen: There's a number of different test procedures that are run in the development process of a new tire before it goes into production.

Mr. O'Connor: Do we have any of those tests, sir? Mr. Olsen: I don't have them, no.

Mr. O'Connor: Are they still available?

Mr. Olsen: I don't believe so.

(Doc. 938-1 at 40-45).

Defense counsel then asked Mr. Olsen some questions based on a document previously examined during the deposition. That document described the high-speed test data produced by Goodyear:

Defense Counsel: Okay. The – earlier on, the plaintiffs' counsel asked you about an exhibit . . . it is the test data for high-speed wheel tests performed on this tire. Do you have that?

Mr. Olsen. Yes. . . .

Defense Counsel: . . . There are other numbered tests that are not on the exhibit. Is that correct? Do you recall the testimony the plaintiffs' counsel asked you about saying, "Well, we don't have tests, for example, 4 through 7," that sort of thing?

Mr. Olsen: Yes, sir.

> Defense Counsel: As far as you know, are all of the tests that were in the databases that were searched that were on the – this, the tire at issue in this case, this specification tire, in that database, in what you have there?
>
> Mr. Olsen: Yes. They're all included here.

(Doc. 938-1 at40-47).

Based on Plaintiffs' dissatisfaction with Mr. Olsen's testimony, the parties submitted another joint statement of discovery dispute. One of the disputes centered on Plaintiffs' belief that Mr. Olsen "was not sufficiently knowledgeable" on various topics. (Doc. 345 at 1). Plaintiffs also claimed that Goodyear had not produced "all high-speed testing on the G159 tire and has improperly redacted responsive G159 high speed test results." Goodyear claimed it had "produced all 'high speed testing' data more than three months ago." (Doc. 345 at 3). Goodyear also represented that it had not redacted any tests but it had "simply omitted tests with other tires not at issue in the case, which were not part of Plaintiffs' request for the high speed tests ('any speed or endurance testing to determine that the subject tire was suitable for 75 mph highway purposes')." (Doc. 345 at 3). The Court held a hearing on these disputes on October 19, 2007. (Doc. 361).

At that hearing, Mr. Hancock made a number of unequivocal statements. Mr. Hancock averred that "Goodyear has searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). After the Court learned Mr. Olsen may not have been qualified to state that all high-speed testing data had been produced, the Court ordered Mr. Hancock to "ask [Mr. Olsen] just to make sure that . . . that everything that

relates to the high-speed testing of this tire has been produced." Mr. Hancock responded: "I will do that, Your Honor. I will supplement our record. I believe that to be the case. I have checked with my client and confirmed that that is the case."[4] (Doc. 361 at 46). Mr. Hancock then went on to "flesh out the record." He stated

> Goodyear's normal document retention policy means we don't have those records anymore. These are not government-required tests. You don't keep them. . . . So there were tests done. Mr. Olsen can testify about those tests but there are no documents for him to be questioned about other than the documents that have been produced and we will supplement with direct confirmation of that.

(Doc. 361 at 47). After a break, Mr. Hancock affirmed that Plaintiffs had asked for "documents which relate to any speed or endurance testing to determine that the subject tire was suitable for 65 miles per hour." (Doc. 361 at 53). Mr. Hancock affirmed yet again that Goodyear

> has searched for and produced all of the high-speed testing on this tire. The original discovery request, which is how we got here, were all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced.

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[4] The record does not reflect whether Mr. Hancock asked Mr. Olsen about the highspeed tests but the record is clear that Mr. Hancock did not provide any additional test results after this discussion.

(Doc. 361 at 58-59). Mr. Hancock continued with "The discovery request is what did you rely on and tell the public that this tire could go 75 miles an hour? All of that testing has been produced. This tire goes out for sale and we produced all of the testing on any tire that was the same as any of the tires for sale." (Doc. 361 at 63).

III. Post-Discovery Activity

Discovery formally ended shortly after the October 2007 hearing and the parties began briefing dispositive motions. The dispositive motions involved a wide array of complicated issues which, for purposes of this Order, are irrelevant. While those motions were pending, Plaintiffs agreed to dismiss Gulf Stream. (Doc. 635). Eventually, the Court issued a lengthy order denying Plaintiffs' motion for summary judgment and denying in part and granting in part Goodyear's motion for summary judgment. (Doc. 651). The Court also granted Spartan's motion for summary judgment, dismissing Spartan from the case. (Doc. 652). Plaintiffs and Goodyear then prepared for trial by inundating the Court with motions in limine and other pretrial filings. The Court devoted substantial time and effort to resolving those motions. (Doc. 842, resolving over thirty motions). On April 14, 2010, the first day of trial, Plaintiffs and Goodyear informed the Court they had reached a settlement. (Doc. 926). As a result, the case was closed.

IV. Plaintiffs' Counsel Writes to Goodyear About Undisclosed Tests

On January 6, 2011, Plaintiffs' counsel wrote to Goodyear's counsel and stated he had "great concern regarding the adequacy and honesty of the disclosures made" in this case. (Doc. 938-1 at 49). This concern

was based on information produced in another case involving a G159 tire. In that other case, Goodyear had produced "internal heat test records." Plaintiffs' counsel observed that no such data was produced in this case and he asked whether such records actually exist. In response, Goodyear's counsel stated "Goodyear stands behind its discovery responses in the *Haeger* case, and we stand behind the properly-stated objections to the scope of the discovery requests propounded by the plaintiffs in this case." (Doc. 938-1 at 53). Plaintiffs' counsel then emailed Goodyear's counsel, asking for a direct answer whether "internal heat test records" existed. (Doc. 938-1 at 56). Goodyear's counsel responded that it would not be "productive to debate these issues further." (Doc. 938-1 at 56).

Plaintiffs' counsel sent a follow-up letter, which Goodyear's counsel responded to by claiming Plaintiffs' allegations were "unprofessional and without merit." (Doc. 938-1 at 66). Goodyear's counsel stated Goodyear had "abided by all of Judge Silver's rulings and we take issue with any suggestion that we were disrespectful or misled the court in any manner or that we failed to comply with any of her rulings in this case." Goodyear's counsel admitted "it is true there are testing records regarding the [G159] tire that were not produced in the *Haeger* litigation. That fact was clear during the course of the litigation, and certainly at the time plaintiffs chose to resolve this case." (Doc. 938-1 at 66).

V. Plaintiffs File a Motion for Sanctions

On May 31, 2011, Plaintiffs filed a motion for sanctions based on alleged "discovery fraud." (Doc. 938). Goodyear opposed the motion, primarily arguing it was too late for Plaintiffs to seek discovery sanctions. (Doc. 948). Goodyear was ordered to

produce the testing records at issue and Plaintiffs filed a reply explaining the importance of those records. (Doc. 954, 963). Spartan subsequently joined the motion for sanctions, arguing it also suffered harm as a result of Goodyear's alleged misconduct. (Doc. 966).

VI. Explanation of Undisclosed Test Results

An explanation of the undisclosed test results shows how they were relevant to this case. The tests are titled "Laboratory Durability Testing–Heat Rise" and were conducted on four G159 tires on April 21, 1996. The tests were meant to "determine the dynamic heat build-up at specific loads, speeds, and inflations." The tests were conducted on a "67.23 [inch] diameter flywheel." The tests consisted of running the tires at 35 miles per hour and checking the temperature of the tire at certain intervals. The tests describe 35 miles per hour as reflecting "highway use." Even though 35 miles per hour seems substantially slower than highway speeds, the rationale for this description is explained by Goodyear's 30(b)(6) witness. Testing a tire on a 67-inch flywheel places "upwards of double the speed" impact on a tire as the tire impact of "a vehicle on a road surface." In other words, "if you run 45 miles an hour on the steel flywheel [that] is the equivalent temperaturewise of 70, 80 miles an hour on the public highway as far as the heat history goes." (Doc. 963-1 at 61). Under this logic, testing tires at 35 miles per hour on a flywheel would be the equivalent of 55-65 miles per hour on the highway.

According to the results, after running at 35 miles per hour, the G159 tires generated temperatures of up to 229 degrees. Goodyear's internal documents, own expert, and 30(b)(6) witness all agree that this temperature is high and would be cause for concern. Thus, if these tests had been disclosed Goodyear's defense

would have been severely compromised; it would have been difficult, if not impossible, for Goodyear to claim the G159 was suitable for use on a motor home given its own testing data that G159 tires reached temperatures well above 200 degrees at speeds of 55-65 miles per hour.

ANALYSIS

I. Standard for Awarding Sanctions

Given that this case was dismissed pursuant to the parties' agreement, there are two possible bases for imposition of sanctions against Goodyear and its counsel: 28 U.S.C. § 1927 and the Court's inherent power.[5] As set out below, sanctions are appropriate under both.

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[5] Sanctions pursuant to Federal Rule of Civil Procedure 11 should ordinarily be imposed before the case is closed. *See* Moore's Federal Practice § 11.22(2)(a) ("[T]he court should ordinarily impose [Rule 11] sanctions before issuing a final order."). The Court notes, however, that the behavior by Goodyear's counsel raises serious Rule 11 concerns. For example, on October 15, 2007, Mr. Hancock stated in a written submission that "Goodyear produced all 'high speed testing' data . . . more than three months ago." (Doc. 345 at 3). Given the underlying facts, it appears this statement could not have been "formed after an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). At that point in time, the request for testing had been outstanding for well over a year and it seems unlikely, although possible, that Mr. Hancock did not know about the undisclosed test results. As explained in the Rule 11 Advisory Committee Notes, if a party has had time to conduct an investigation and does not have evidentiary support for a particular factual contention, "the party has a duty under the rule not to persist with that contention." This case now appears to contain numerous instances of Mr. Hancock persisting with factual contentions regarding testing data in violation of Rule 11.

A. 28 U.S.C. § 1927 Cannot Reach Goodyear's Conduct

Pursuant to 28 U.S.C. § 1927, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this statute, an attorney's conduct is sanctionable only if it multiplies the proceedings in both an "unreasonable and vexatious manner." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002). In addition, an attorney must have acted in bad faith or engaged in conduct tantamount to bad faith. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The imposition of sanctions under § 1927 requires a finding of bad faith."). But this statute allows for sanctions *only* against "an attorney or otherwise admitted representative of a party." *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986). Therefore, any sanctionable conduct by Goodyear itself is beyond the reach of § 1927.

B. The Court's Inherent Power Can Reach Both Goodyear And Counsel

"Under its inherent powers, a district court may . . . award sanctions in the form of attorneys' fees against *a party or counsel* who acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (emphasis added). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Thus, as with sanctions under Section 1927, before awarding sanctions under its inherent power, the Court "must make an express finding that the

sanctioned party's behavior constituted or was tantamount to bad faith." *Id.*

C. Definition of Bad Faith

A comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible but the type of conduct at issue "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). Such conduct includes "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991). And "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F.3d at 994. Thus, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. *Id. See also Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith).

D. Appropriate Type Of Sanctions

At issue in this case are a variety of actions which, when viewed together, represent attempts by Goodyear and its counsel to mislead Plaintiffs and the Court and to thwart the resolution of this case on the merits. In particular, Goodyear's discovery practices, numerous statements in court filings, and in-court statements show Goodyear and its counsel acted in bad faith or engaged in conduct tantamount to bad faith.

The misconduct at issue appears to have stemmed from a deliberate corporate strategy adopted by Goodyear to prevent the disclosure of the internal heat test results. This is supported by the fact that Goodyear's 30(b)(6) witness did not disclose the test results and even testified that they did not exist. Also, Goodyear apparently did not disclose these test results in other cases pending across the country. Because section 1927 sanctions cannot be imposed on Goodyear, the Court's inherent power is the appropriate vehicle for sanctioning Goodyear for its misconduct. See Chambers, 501 U.S. at 50 ("[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

The sanctioning of Goodyear's counsel, however, is possible under Section 1927. [6] Goodyear's counsel made repeated statements that, on the present record, appear misleading and often simply false. These statements "multiplie[d] the proceedings . . . unreasonably and vexatiously" by requiring the parties to brief, and the Court to resolve, countless discovery disputes. 28 U.S.C. § 1927. Counsel's statements were potentially made in either subjective bad faith or, at the very least, recklessness with the improper purpose of hiding otherwise discoverable documents. In these circumstances, the Court has a "duty to examine the charge of unethical behavior [by counsel] and impose the necessary sanctions." *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996).

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[6] When possible, courts should use means of imposing sanctions other than their inherent power. *Chambers*, 501 U.S. at 50.

II. Inappropriate Discovery Responses and 30(b)(6) Deposition

The troubling behavior by Goodyear and its counsel began almost immediately after the case was filed and continued throughout the pretrial proceedings. That behavior included inappropriate responses to requests for production as well as false testimony by Goodyear's 30(b)(6) witness.

A. First Request for Production of Documents

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs served their First Request for Production of Documents ("First Request") shortly after the case began. (Doc. 59). That request sought "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." When responding to this request, Goodyear had two options. First, Goodyear could serve an objection to the request as a whole. Fed. R. Civ. P. 34(b)(2)(B). Second, Goodyear could serve an "objection to part of [the] request" *provided* it specified the part it was objecting to and it responded to the non-objectionable portions. Fed. R. Civ. P. 34(b)(2)(C). What Goodyear could not do, but that which it did, was combine its objections with a partial response, without any indication that the response was, in fact, partial.[7] Goodyear apparently believes that its response to the First Request was sufficient to signal to Plaintiffs that other potentially responsive material was not being produced. This position finds no support in the Federal Rules, federal case law, or commonsense.

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[7] It is especially troubling that Goodyear claimed its secretly partial response was being made "in a good faith spirit of cooperation."

The language of Rule 34 is clear. The rule states "An objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). As clarified in the 1993 Advisory Committee notes, this language is meant to "make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions." The natural corollary of this is that any objection must identify the particular portion which is not being responded to on the basis of the objection. As restated in Moore's Federal Practice, "If the party objects to the production of an item or category in part rather than in its entirely, *the objection must specify the part to which the objection pertains*." Moore's Federal Practice § 34.13(2)(b) (emphasis added). And in Federal Practice and Procedure: "The responding party may object to some or all of the discovery sought. In this case it must state, with respect to each item or category to which objection is made, the reason for the objections. *One who objects to part of an item or category should specify to which the objection is directed.*" Federal Practice and Procedure § 2213 (emphasis added). The plain language of Rule 34 requires a partial response be identified as such.

This plain language analysis is supported by case law. For example, in *Rodriguez v. Simmons*, 2011 WL 1322003, at *7 (E.D. Cal.), the plaintiff had served a Rule 34 request for medical records. The defendants served objections and indicated they had already produced some responsive documents. The court observed this response was inadequate. In the court's view, the defendants had to "clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld" based on an objection. *Id.* It was especially critical if the documents existed but were being withheld that plaintiff "be

made aware of this fact." *Id.* at *7 n.9. This would allow the parties to confer and attempt to resolve whether the unproduced documents should be produced prior to any court involvement.

Similarly, in *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, 2011 WL 939226, at *9 (D. Kan.), a defendant had produced documents "subject to" certain objections. The plaintiff believed this response was inappropriate because it was left "wondering whether all documents [had] been produced, or if some documents [were] still being withheld." *Id.* at *8. The court agreed the response was insufficient. The court observed the defendant could "object to part of a document request," but production "subject to" general objections was not permitted because such objections failed "to specify exactly what part of the document requests [was] being objected to." The failure to comply with Rule 34 left the plaintiff "guessing as to whether Defendant has produced all documents, or only produced some documents and withheld others." *See also GMAC Real Estate, LLC v. Joseph Carl Sec., Inc.*, 2010 WL 432318, at *1 (D. Ariz.) ("Objections must be in writing and identify the particular portions of the request subject to the objection; all other portions should be made available for inspection.").

Commonsense also supports this reading of Rule 34. Were Goodyear correct that Rule 34 allows litigants to make undisclosed partial document productions, discovery would break down in practically every case. A litigant with *any* viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial and the opposing party would have no way of

knowing the production was partial. Courts would then be flooded with motions to compel by litigants seeking to confirm that undisclosed responsive documents did not exist. The courts would have no way of assessing the propriety of the objections because there would be no indication what, exactly, the responding party had objected to and whether there were other responsive documents being withheld.

Finally, even if the plain language, case law, and commonsense were not enough to show Goodyear's response to the First Request was lacking, there was no good faith basis for Goodyear's objections to the First Request. The internal heat tests were performed on the *exact* tire at issue, they were *directly* relevant to Plaintiffs' defect theory, and they were performed at the *same time* other tests, which were produced, were performed. There is no doubt that had the Court been presented with a motion to compel regarding the internal heat tests, that motion would have been granted. Goodyear's response show bad faith or conduct tantamount to bad faith.

B. Third Request for Production of Documents

Plaintiffs' Third Request for Production of Documents ("Third Request") sought "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). Goodyear's response was, yet again, misleading. Goodyear unilaterally decided that this request sought "high speed durability test results." (Doc. 938-1 at 36). Goodyear then produced the "high speed durability test results" it had, but also objected to the request as "overly broad, unduly burdensome, [and] seeks irrelevant and confidential information." (Doc. 938-1 at 36). These objections apparently served as the basis

for not producing the "Laboratory Durability Testing–Heat Rise" test results. Again, Goodyear apparently believes the onus was on Plaintiffs to conclude that Goodyear's responses indicated other documents *did* exist and Plaintiffs should have sought Court assistance to obtain those documents. As explained above, this position is not the one mandated by Rule 34.

In addition, there was no good faith basis for Goodyear to refuse to produce the heat test results in response to the Third Request. In fact, Goodyear's refusal to produce the heat test results in response to the Third Request was even less justified than its failure to produce the test results in response to the First Request. The Third Request was sufficiently narrow that Goodyear finally decided to produce the "high speed durability tests results." It is impossible to read the Third Request as covering the test results Goodyear *did* produce but excluding the heat test results it *did not* produce. The heat test results were responsive to the Third Request and had the issue been presented to the Court, Goodyear would have been ordered to produce the results as relevant evidence.

Goodyear's carefully crafted response to the Third Request was an attempt to give the impression that there were no documents other than those being produced. The present record establishes Goodyear's behavior was done in bad faith or constituted conduct tantamount to bad faith.

C. Goodyear's 30(b)(6) Witness

In September 2007, Plaintiffs deposed Richard Olsen as Goodyear's 30(b)(6) witness. Prior to this deposition, the Court confirmed with Goodyear's

counsel that Mr. Olsen would be speaking on behalf of Goodyear. (Doc. 243 at 29). During his deposition, Mr. Olsen was asked if there were any other "high-speed tests" in addition to the ones Goodyear had produced. Mr. Olsen responded there were not. (Doc. 938-1 at 40-45). That was false. Mr. Olsen was also asked if there was "any separate testing" besides the tests Goodyear had produced. Mr. Olsen responded there were a "number of different test procedures" run during the development process but no documentation of those other tests was available. That was false.

While it was possible Mr. Olsen simply was unaware of the undisclosed heat tests, the present record provides no explanation for Goodyear proffering a witness who was not sufficiently knowledgeable. Regardless of whether Mr. Olsen was being knowingly untruthful, at the time of his deposition he was speaking on behalf of Goodyear. Fed. R. Civ. P. 30(b)(6) (corporation must designate person "to testify on its behalf"). Therefore, Mr. Olsen had an obligation to "review all corporate documentation" that was relevant to the deposition topics. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001). Given that other tests *were* available, Mr. Olsen's statement that other tests did not exist was an affirmative misstatement of fact by Goodyear and establishes bad faith or is conduct tantamount to bad faith.[8]

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[8] The Court recognizes that testimony by a 30(b)(6) witness may not absolutely bind "a corporate party to its designee's recollection." *See A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (finding 30(b)(6) testimony does not act as binding judicial admission). But Goodyear has not claimed Mr. Olsen simply misspoke or was not aware of the other tests. Moreover, excusing this type of behavior based on its witness's

III. Mr. Hancock's Misleading Statements

Goodyear's behavior during discovery is sufficient to support an award of sanctions under the Court's inherent power. In addition, Mr. Hancock's in-court statements qualify as evidence of additional misconduct.[9] Those statements show *clear and repeated* attempts to mislead Plaintiffs and the Court.

Plaintiffs first requested Goodyear's testing data in September 2006. Goodyear decided not to comply with its obligation to produce its testing data until June 2007. Therefore, any statement prior to June 2007 that Goodyear had produced all requested documents was false. For example, on January 3, 2007, Mr. Hancock stated it had produced all information responsive to the first set of requests of production. (Doc. 116 at 33). That was false. On April 6, 2007, the Court asked whether Goodyear had "any internal documentation" that had been requested but not produced. Mr. Hancock responded that it had produced all the requested documents. (Doc. 146 at 13). That was false. On April 17, 2007, the Court asked Goodyear "are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?" Mr. Hancock responded that there were, but they had only been requested "last week." That was false.[10] Mr. Hancock also stated the tests would be produced in mid-June. Given the apparent

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faulty recollection would reward Goodyear for not adequately preparing that witness to discuss the topics identified in the deposition notice.

[9] Even viewed charitably, Goodyear's discovery practices ignored the longstanding proposition that the "discovery process is subject to the overriding limitation of good faith. *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981).

[10] The tests had been requested in September 2006.

plan to never produce the internal heat test results, this statement was misleading at best.

After Goodyear produced the limited testing data, it continued to make untruthful statements to the Court. For example, on September 10, 2007, Mr. Hancock stated Goodyear had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). That was false. At a hearing on October 19, 2007, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). That was false. At that same hearing, Mr. Hancock also stated there were "no documents for [its 30(b)(6) witness] to be questioned about other than the documents that have been produced." That was false. And finally, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing on this tire. The original discovery request [was for] all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced." That was false.

Mr. Hancock and Goodyear might believe these repeated misstatements can be justified because, based on Goodyear's own undisclosed definition, the internal heat tests did not qualify as "high-speed tests." There are two problems with this position. First, Plaintiffs' discovery requests were not for "high-speed tests." The Third Request for Production of Documents sought "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). The internal heat test results are from a test Goodyear itself identified as

"highway testing." Such test results are *obviously* responsive. In fact, the Court is confident that if the internal heat tests had shown the tire *did not* have heat problems, Goodyear would have produced it during discovery in response to Plaintiffs' requests. It was only because the test results were so damning that Goodyear choose to withhold the results.

The second problem with Goodyear relying on its own highly specific definition of "high-speed testing" as a justification for withholding the heat test results is that not all of its misstatements were made in the specific context of "high-speed tests." In other words, even if the Court were to accept Goodyear's untenable position that the internal heat test results were not "high-speed tests," there is still unequivocal evidence of misconduct. The most stark example of this came in April 2007 when the Court asked whether Goodyear had "any tests . . . for speeds *above 30 miles an hour*?" (Emphasis added). Mr. Hancock responded Goodyear did have such tests and those tests would be produced. But the undisclosed tests were conducted at *35 miles per hour* and were not produced. Even under an implausibly generous interpretation of "high-speed testing," Mr. Hancock still materially misrepresented the facts.[11] Mr. Hancock's repeated falsehoods represent instances of subjective bad faith or recklessness with the improper purpose of thwarting discovery.

The Court is aware that the vicissitudes of representing a client can lead an attorney to zealously, but unknowingly, make representations that are false. The Court reserves ruling on whether counsel's

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[11] This statement represented a breach of counsel's "duty of good faith and candor in dealing with the judiciary." *United States v. Associated Convalescent Enters. Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985).

behavior was undertaken in subjective bad faith or mere recklessness with an improper purpose.

IV. Goodyear's Post Litigation Conduct

Goodyear's national counsel made a statement in a letter to Plaintiffs' counsel the Court must specifically address. According to Goodyear's counsel, it was "clear during the course of the litigation" that Goodyear had chosen not to produce the internal heat test results. (Doc. 938-1 at 66). There is no plausible way to read the record as supporting this contention. It certainly was *not* clear to the Court that Goodyear was withholding documents regarding the G159's performance in "highway" testing. Had it been "clear" to the Court what Goodyear and its counsel were doing, the Court would have immediately ordered disclosure and imposed sanctions for misconduct. To claim this Court would *knowingly* allow Goodyear to withhold relevant and discoverable information is outrageous. In addition, the claim by Goodyear's counsel that Plaintiff's allegations were "unprofessional and without merit" is preposterous on this record. (Doc. 938-1 at 66).

V. Appropriate Scope of Sanctions

> What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting). Given the behavior by Goodyear and its counsel, the Court must impose sanctions. Unfortunately, the present record does not

indicate who is responsible for each instance of misconduct nor does it indicate the appropriate amount to be awarded. The amount and allocation of the sanctions will be determined after further briefing by the parties.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 11/08/12]

No. CV-05-02046-PHX-ROS

LEROY HAEGER, et al.,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER CO., et al.,

Defendants.

ORDER

Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests.[1] The little voice in every attorney's conscience that murmurs *turn over* all material information was ignored.

Based on a review of the entire record, the Court concludes there is clear and convincing evidence that sanctions are required to be imposed against Mr. Hancock, Mr. Musnuff, and Goodyear. The Court is aware of the unfortunate professional consequences

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[1] *See Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (lawyer's "duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

that may flow from this Order. Those consequences, however, are a direct result of repeated, deliberate decisions by Mr. Hancock, Mr. Musnuff, and Goodyear to delay the production of relevant information, make misleading and false in-court statements, and conceal relevant documents. Mr. Hancock, Mr. Musnuff, and Goodyear will surely be disappointed, but they cannot be surprised.

FINDINGS OF FACT

I. The Accident

In June 2003, Leroy and Donna Haeger, along with Barry and Suzanne Haeger (collectively "the Haegers"), were traveling in a motor home owned by Leroy and Donna. It was manufactured by Gulf Stream Coach ("Gulf Stream") on a chassis manufactured by Spartan Motors, Inc. ("Spartan"). The motor home had "G159" tires manufactured by Goodyear Tire and Rubber Company ("Goodyear"). While traveling on the highway, one of the motor home's front tires failed, followed immediately by the motor home leaving the road and tipping over.[2] The Haegers suffered serious injuries as a result. The motor home was insured by Farmers Insurance Company ("Farmers").

II. Initial Proceedings

In 2005, the Haegers and Farmers sued Gulf Stream, Spartan, and Goodyear. The Haegers and

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[2] The cause of the accident was never definitively determined. Goodyear claimed the tire failed due to a previous impact which had severely damaged the tire and the accident was a result of driver error after that failure. The Haegers claimed there had been no impact, the tire failed because it was defective, and the accident was unavoidable.

Farmers alleged various product liability and negligence claims, including a claim that G159 tires were defective if used on motor homes. (Doc. 13). The Haegers were represented by David Kurtz. Goodyear was represented by Graeme Hancock of Fennemore Craig PC and Basil Musnuff of Roetzel & Andress in Akron, Ohio. Because Goodyear was being sued throughout the country based on alleged defects in the same G159 tire, it had appointed Mr. Musnuff as "national coordinating counsel" on all G159 cases. (Doc. 1014 at 93). In that role, Mr. Musnuff was responsible for reviewing discovery requests, coordinating the search for documents, and drafting responses. (Doc. 1014 at 124-25). Mr. Musnuff worked directly with Goodyear's in-house counsel Deborah Okey.[3]

On December 15, 2005, Goodyear served its Initial Disclosure Statement. (Doc. 992 1 at 20). According to that statement, "Plaintiffs' allegations with regard to the subject tire [were] unclear." (Doc. 992-1 at 23). Based on the alleged uncertainty, Goodyear's disclosure statement contained no meaningful information. In fact, it appears Goodyear's disclosure statement largely referenced witnesses and documents previously provided to Goodyear by Plaintiffs. Mr. Kurtz was not satisfied with Goodyear's initial disclosure and he wrote to Mr. Hancock and asked that Goodyear "take a more reflective look at your disclosure statement and comply with both the spirit and intent of the rule." (Doc. 992-1 at 27). In particular, Mr. Kurtz asked Goodyear to provide more meaningful disclosures regarding individuals who might have relevant

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[3] There were other attorneys involved in representing Goodyear, but the parties agree these were the attorneys responsible for Goodyear's behavior during this case.

information regarding the tire. Mr. Kurtz also asked Goodyear to produce "[t]esting documentation regarding the G159 tires." (Doc. 992-1 at 29). Goodyear did not supplement its initial disclosure in any relevant way.

III. Plaintiffs' Responses to Interrogatories

On August 18, 2006, Plaintiffs responded to a set of interrogatories from Goodyear.[4] Goodyear's interrogatory number 5 asked for "each legal theory under which you believe Goodyear is liable." (Doc. 963-1 at 19). In response, Plaintiffs stated it had been inappropriate to market the G159 tire for use on motor homes. According to Plaintiffs: "Prolonged heat causes degradation of the tire which, under appropriate circumstances, can lead to tire failure and tread separation even when the tire is properly inflated." (Doc. 963-1 at 20). Because the G159 was originally designed "for pick-up and delivery trucks," Plaintiffs claimed using the tire on motor homes meant it was "operating at maximum loads and at maximum speeds, producing heat and degradation to which the tire was not designed to endure, leading to its premature failure." (Doc. 963-1 at 20) (emphasis added). Accordingly, as of approximately August 18, 2006, Goodyear and its counsel knew Plaintiffs' liability theory and that heat would be a central issue in this case.[5]

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[4] There was a significant delay early in the case while the parties briefed, and the Court decided, whether to transfer the case to New Mexico. (Doc. 40).

[5] In an email from Mr. Hancock to Mr. Musnuff dated October 18, 2006, Mr. Hancock explained Plaintiffs' theories in some detail. (Plaintiffs' Statement of Fact in Support of Supplemental Brief ("PSOF") Ex. 4). And in an email from Mr. Musnuff to Ms. Okey dated November 9, 2006, Mr. Musnuff discussed the

IV. First Discovery Dispute and Protective Order

In August 2006, the parties filed their first notice of a discovery dispute. (Doc. 49). That disagreement centered on the terms of a protective order. The parties could not agree on how material designated "confidential" should be handled and on whether the protective order should include a provision allowing Mr. Kurtz to "share" information with other counsel litigating G159 claims against Goodyear elsewhere in the country. (Doc. 49). On August 22, 2006, the Court held a scheduling conference and also addressed the pending disagreements.

At the conference, Plaintiffs were represented by David Kurtz and Goodyear was represented by Mr. Hancock. When asked to explain the parties' disputes, Mr. Kurtz began by stating he was concerned Goodyear would abuse the provision allowing for documents to be designated "confidential." In effect, Mr. Kurtz wanted the protective order to contain a provision that would allow Goodyear's counsel located elsewhere to designate documents as "confidential." Local counsel, however, would be required to make "a reasonable inquiry to verify that in fact those confidentiality designations have been thoughtfully made by appropriate people." (Doc. 53 at 8). The Court rejected Mr. Kurtz's request and stated local counsel would not have to personally verify all "confidential" designations. But the Court also observed that local counsel remained "responsible for anything that's filed

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"new theory of liability in *Haeger*." (PSOF Ex. 5). Therefore, the repeated representations by Goodyear and its counsel that Plaintiffs did not state the legal theory of their case until January 7, 2007 is incorrect, contradicted by their own statements, and now appears to have been part of a general strategy to obstruct and delay discovery. (Doc. 983 at 4).

in this court . . . [and] they have a good-faith obligation to the Court and they are officers of the Court." (Doc. 53 at 8).

As for the sharing provision, Plaintiffs argued it was necessary to ensure that all parties litigating cases against Goodyear would receive "the appropriate and complete data in similarly situated cases." (Doc. 53 at 10). The Court rejected this request, emphasizing that "every officer before this Court has an obligation to provide all relevant discovery." (Doc. 53 at 10). The Court observed that the Federal Rules already provide "that anything that is relevant must be turned over to counsel and to all the parties," so there was no need for the sharing provision. Therefore, as of August 2006 all counsel were expressly aware of the Court's expectations regarding discovery. The Court signed the scheduling order and the parties began discovery in earnest.

V. Plaintiffs' First Request for Production of Documents

In September 2006, Plaintiffs served Goodyear with their First Request for Production of Documents ("First Request"). (Doc. 59). Approximately thirty days later, Goodyear provided its responses. As later explained by Mr. Musnuff, in preparing discovery responses Mr. Musnuff would draft the responses, send them to Ms. Okey for approval, and after Ms. Okey approved them, they would be sent to local counsel for filing and service. (Doc. 1014 at 65-66). While Mr. Musnuff was tasked with drafting responses, Ms. Okey was always the final decision maker regarding discovery responses. (Doc. 1014 at 67).

The initial responses drafted by Mr. Musnuff, approved by Ms. Okey, and signed by local counsel

consisted of sixteen "general objections" and then specific objections to each request which largely referenced the general objections. (Doc. 938-1 at 19). For example, Plaintiffs' Request for Production No. 14 sought: "All test records for the G159 tires, including, but no[t] limited to, road tests, wheel tests, high speed testing, and durability testing." (Doc. 938-1 at 24). Goodyear's response was:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.

The record does not reflect any communications between Plaintiffs and Goodyear until Goodyear provided supplemental responses on November 1, 2006. (Doc. 62, 63). Most relevant here is Goodyear's supplemental response to the same "Request for Production No. 14." The supplemental response was:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.
>
> SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation,

> Goodyear will produce, subject to the Protective Order entered in this case, the DOT test data for the Subject Tire for the Subject Time Frame.

(Doc. 948-1 at 54).

The sequence of events following Goodyear's supplemental responses is intensely disputed. On December 5, 2006, Mr. Kurtz and Mr. Hancock spoke on the phone. That conversation was about the difficulties the parties were having regarding discovery. According to a memorandum to the file Mr. Hancock prepared, during the call:

> I explained to [Mr. Kurtz] that the 'testing' universe he had asked for was overly broad and included all kinds of tests done on component parts or on design criteria that had nothing to do with anything we had seen involving this case. I anticipate [Mr. Kurtz] will send us a revision that asks for testing that has to do with high speed.

(Doc. 1032-2 at 51). On the particular issue of Request for Production No. 14, the memorandum stated Mr. Kurtz "agreed to be more specific about what kinds of tests he was looking for." (Doc. 1032-2 at 53). Mr. Kurtz has submitted an affidavit disputing Mr. Hancock's interpretation of that phone call. According to Mr. Kurtz, he "never withdrew or otherwise narrowed the scope of [the] original discovery requests." (Doc. 992-1 at 40). Mr. Kurtz states he "had no phone conversation with Mr. Hancock in December" where he made such an agreement. In short, according to Mr. Kurtz: "Nothing like [the events described by Mr. Hancock] ever occurred." (Doc. 992-1 at 40). The Court need not decide whose

recollection of the December 5, 2006 phone call is accurate. Any question of whether there was an understanding evaporated after a letter from Mr. Kurtz to Mr. Hancock.

On December 20, 2006, Mr. Kurtz sent Mr. Hancock a letter. That letter was meant as "a follow up of our recent discussions regarding discovery disputes." (Doc. 1044-2 at 17). The letter is lengthy and goes through numerous discovery disputes the parties were having. Most relevant here is the portion of the letter devoted to Request for Production No. 14. The letter states:

> *Request for Production No. 14.* We asked for test records for the G159 275/70R 22.5, including road tests, wheel tests, high speed testing, and durability testing. You objected, suggesting the test records were overly broad and unduly burdensome. You have only produced the DOT test data showing the tires were tested at 30 mph. My interest is in finding the rest of the test data. If there is any, it is your obligation to disclose it.

(Doc. 1044-2 at 25).

After receiving this letter, Mr. Hancock wrote an email to Mr. Musnuff. That email opened by stating: "We should either respond to any portions of Kurtz' 12.20 letter or figure out that we have a fight on our hands on these points and prepare a counter argument." (PSOF Ex. 7). The email goes through the entirety of Mr. Kurtz' letter but contains a specific reference to the Request for Production No. 14 and asks for guidance from Mr. Musnuff:

> RTP 14. Test records for all testing on this size G159 tire. Again, was the only testing at 30 mph or less? What speed testing/fleet

> testing did Goodyear rely on? Can/should we supplement since his theory is that this tire can't operate at 75 mph in the southwest for long periods?

(PSOF Ex. 7). The record does not contain Mr. Musnuff's response to this email.

Based on this evidence, the December 5, 2006 phone call may have led to confusion on Mr. Hancock's part whether the Request for Production No. 14 remained in place. But Mr. Kurtz's December 20, 2006 letter cleared up any possible confusion. Upon receiving that letter, Mr. Hancock undoubtedly knew Plaintiffs' Request for Production No. 14 had not been withdrawn or narrowed. In particular, this is evidenced by Mr. Hancock's email to Mr. Musnuff stating Goodyear needed to "figure out if we have a fight on our hands." Mr. Hancock could not have simultaneously believed that Mr. Kurtz withdrew the request but also that Goodyear might have "a fight on [its] hands." Moreover, Mr. Hancock explicitly acknowledged that Mr. Kurtz continued to request "[t]est records for all testing." (Emphasis added). Mr. Hancock's email establishes Mr. Musnuff knew about Mr. Kurtz's letter and that Mr. Musnuff knew Plaintiffs' Request for Production No. 14 was still active.

For simplicity and clarity, as of December 20, 2006 Mr. Hancock and Mr. Musnuff *knew* there was an outstanding request for: "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." Any suggestion by Mr. Hancock and Mr. Musnuff that Mr. Kurtz had withdrawn his First Request is belied by the evidence of what they knew in December 2006. In addition, the position later advanced by Goodyear that it was relieved of any further obligation

to respond to the First Request because it had lodged objections cannot be taken seriously. Mr. Hancock's email establishes Goodyear's counsel did not believe Mr. Kurtz needed to seek relief from the Court to obtain any further information from Goodyear. And finally, as of January 2, 2007, the date of Mr. Hancock's email, Mr. Musnuff *knew* the theory of Plaintiffs' case, and *knew* the request for additional test data was outstanding, but he neglected to even begin a search for responsive documents.

VI. Goodyear Discovers High Speed Testing

On January 5, 2007, Plaintiffs disclosed their expert witnesses. (Doc. 103). One of Plaintiffs' experts was David Osborne. Mr. Osborne's expert report identified the speed at which the tire was operated as a contributing factor to its failure. Mr. Hancock and Mr. Musnuff exchanged emails after reviewing Mr. Osborne's report. Mr. Musnuff wrote to Mr. Hancock:

> Osborne appears to draw the conclusion that the subject tire was only tested at speeds up to 30 mph from the fact that the only test data we produced is the DOT test data. Of course, our discovery response was limited to DOT test data because plaintiff had not yet identified their defect theory at that time. Now that plaintiffs are pinpointing speed as an issue, perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds. Thoughts?

(PSOF Ex. 8). Mr. Hancock responded: "Yes, we should produce the testing that shows this tire was capable of prolonged speed use and was built for the rated load and had a wide safety margin." (PSOF Ex. 8).

On January 11, 2007, Mr. Musnuff emailed Ms. Okey to give her a copy of Mr. Osborne's report. That email contained the same paragraph Mr. Musnuff sent to Mr. Hancock and concluded that "we should consider supplementing our discovery responses to show the testing of this tire at various higher speeds." (PSOF Ex. 9). Therefore, as of January 11, 2007, Mr. Hancock, Mr. Musnuff, and Ms. Okey were aware Plaintiffs had "pinpoint[ed] speed as an issue" and that Goodyear needed to "consider supplementing" its prior discovery responses. The record does not contain any indication whether Mr. Hancock, Mr. Musnuff, or Ms. Okey had further conversations on this point. The record is clear, however, that no supplementation ever occurred.

Around this same time, Mr. Musnuff was working with Sherman Taylor, a Goodyear tire engineer, "to locate documents and test data regarding the G159 Tire."[6] (Doc. 984-1 at 9). Based on receipt of Mr. Osborne's opinion, Mr. Musnuff asked Mr. Taylor "to locate the test data that the Radial/Medium Truck Tire Development Group used to release the G159 Tire for use at highway speeds." (Doc. 984-1 at 10). Mr. Taylor was not able to find "electronic or paper copies of the actual W84 high speed test data Goodyear used to release the G159 Tire for production." (Doc. 984-1 at 10). But on January 24, 2007, Mr. Taylor located "electronic post-production W84 high speed test data ("High Speed Tests") on the G159 Tire." (Doc. 984-1 at 11). When he discovered that data, Mr. Taylor also "discovered L04 heat rise test results ("Heat Rise tests") for the G159 Tire in the same electronic database." (Doc. 984-1 at 11). Mr. Taylor had another

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[6] It was only after receiving the expert report that Mr. Musnuff began looking for any test results. (Doc. 1014 at 86-87).

"employee pull the test results data into text files, which [he] then printed." (Doc. 984-1 at 11). According to Mr. Taylor, "[w]ithin a day or two of printing the test data, I delivered a copy to Mr. Musnuff." (Doc.984-1 at 11). Mr. Taylor's statement refers to both the High Speed tests and the Heat Rise tests. Thus, according to Mr. Taylor, no later than early February 2007, Mr. Musnuff had actual copies of the High Speed and Heat Rise tests, not merely some knowledge that the tests had been conducted.

On February 12, 2007, Mr. Musnuff emailed Mr. Hancock a memo with a summary of the High Speed tests attached. (PSOF Ex 12). According to the memo, "Goodyear did test the [G159] at speeds greater than the 30 mph standard" as reflected in the High Speed tests. (PSOF Ex. 12). Based on that testing, the "tire was capable of being rated as a 75 mph tire."[7] (PSOF Ex 12). That same day, Mr. Musnuff emailed Mr. Taylor and asked about the "list of High Speed Test Results" Mr. Taylor had given to him. Mr. Musnuff asked whether the ten "High Speed Test Results" Mr. Taylor had provided represented "ALL

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[7] Interestingly, Mr. Musnuff notes that the G159 underwent a "significant design change" shortly before the "Haeger accident tire" was manufactured. That change "was a revision to the tread compound that allowed this tire to withstand the heat of high speed operation. The tire already was sufficient to be rated at 75 mph, but this revision would have improved its performance at high speed even more." (PSOF Ex. 12). Clearly, as of February 2007, Mr. Musnuff understood there was a relationship between a particular compound, the heat produced in high speed applications, and the G159's durability. Simply, Mr. Musnuff knew that the specific compound used in a tire relates to that tire's durability. Thus, his later attempted explanations that the Heat Rise test was merely a compounders' test with no bearing on durability is not believable.

occasions on which the subject tire was subjected to [the] High Speed Test." (PSOF Ex. 15). Mr. Taylor responded there were "66 [High Speed] test[s] performed between 1996 & 2002." Mr. Musnuff then asked Mr. Taylor to gather that additional data because "if we disclose any of the [High Speed] testing – which is in our best interest – then we need to produce all of it." (PSOF Ex. 15).

On February 19, 2007, Mr. Hancock emailed Mr. Musnuff to discuss the "Schedule for Haeger." (PSOF Ex. 16). That email stated:

> We need to gather and produce documents re high speed testing as soon as reasonably practicable. No deadline, but we want to produce them promptly, given the accusation of no high speed testing in the January report that put that at issue in the case.

(PSOF Ex. 16). Therefore, no later than February 19, 2007, Mr. Hancock, Mr. Musnuff, and numerous Goodyear employees knew the High Speed tests needed to be produced. Even assuming Mr. Musnuff decided to wait for Mr. Taylor to search for and locate additional test results, there is no acceptable explanation, or one even offered, why Mr. Musnuff did not produce the results he had at that time. While the record establishes Mr. Musnuff and Mr. Hancock both believed the High Speed tests needed to be produced, there is no indication which discovery request Mr. Musnuff and Mr. Hancock believed the tests were responsive to. But given that Plaintiffs had not yet propounded their Third Request for Production of Documents, Mr. Musnuff and Mr. Hancock could not have believed the High Speed tests were responsive only to that later request. Finally, as of February 19,

2007, Mr. Hancock knew that Plaintiffs' expert was relying on the alleged lack of high speed testing.

VII. Statements Made After Learning High Speed Tests Existed

On April 6, 2007, approximately two months after Mr. Hancock knew the High Speed tests existed, the Court held a status conference. (Doc. 146). During that conference, the Court inquired whether the parties were on schedule to complete discovery by the applicable deadline. Plaintiffs' counsel stated he was on schedule. The Court then asked Mr. Hancock for his opinion on whether all discovery could be completed on time.

> The Court: Let me ask defense counsel, is there any internal documentation that is available that has been requested that your client has — clients have not provided?
>
> Mr. Hancock: Your Honor, speaking on behalf of Goodyear, we have responded to all outstanding discovery and those responses have been outstanding for some time and, you know, if a document shows up, we'll of course produce it and supplement our answers but I think we're done or nearly done.
>
> The Court: And your client has provided certification as is required by the rule?
>
> Mr. Hancock: Correct.

(Doc. 146 at 12-13). These statements were false.

Mr. Hancock received notice of the existence of the High Speed tests on February 12, 2007 and sent an email on February 19, 2007 stating Goodyear "need[ed] to gather and produce" them "as soon as reasonably practicable." As of the April 6, 2007 status

conference, the High Speed tests had not been disclosed, Mr. Hancock knew this, and his in-court statements at the April 6, 2007 were untruthful.

VIII. Third Request for Production of Documents

On May 8, 2007, Plaintiffs served their Third Request for Production of Documents ("Third Request"). Three of Plaintiffs' requests are relevant here: numbers 3, 4, and 10. Requests 3 and 4 sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." And Request 10 sought: "All documents which relate to the approval by Goodyear of the [G159] for 75 mph, including, but not limited to, all testing records relating to suitability of the subject tire for that speed." (Doc. 938-1 at 36). In an affidavit, Mr. Kurtz explained why he propounded the Third Request:

> My Third Request for Production utilized alternative language in a request for test records, which followed the language utilized in Goodyear's expert disclosures, which were received in my office in mid-April 2007. Mr. Olsen, Goodyear's in-house expert, specifically expressed his opinion that the G159 tire was designed for general highway use and designed to be operated at continuous highway speeds of 75 mph.

(Doc. 992-1 at 40-41). The Third Request for Production was not intended "to relieve Goodyear of any obligation to properly respond to Plaintiffs' First Request for Production of Documents and Interrogatories" nor was it intended to release Goodyear from "its obligations to timely supplement discovery responses." (Doc. 992-1 at 41). Before Goodyear responded to the

Third Request, the Court held a hearing on a separate discovery dispute.

At the discovery dispute hearing on May 17, 2007, the Court addressed a dispute involving Plaintiffs' attempts to obtain information from Gulf Stream and Spartan regarding other motor home accidents. During discussion of the dispute, Plaintiffs' counsel expressed his belief that this "tire was never tested above 30 miles an hour." (Doc. 201 at 48). Because of this statement, the Court asked a specific question of Goodyear's counsel and received an unequivocal response.

> The Court: Mr. Hancock, are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?
>
> Mr. Hancock: Yes, Your Honor.
>
> The Court: And they have been produced?
>
> Mr. Hancock: No, Your Honor. They have been requested from the plaintiffs in a Request for Production that arrived in my office I believe last week where the discovery response is due in mid-June. And they will be – I have requested them from my client and they will be produced at that time.
>
> The Court: All right. So Mr. Kurtz –
>
> Mr. Kurtz: Your Honor, if I may, we have, as have lawyers across the country, they have asked for these tests. My requests for these speed tests have been outstanding for well over a year and Mr. Hancock himself told me the reason they haven't been produced is because nobody can find them anywhere.

The Court: Well, he's found them. He apparently has found them so you're going to have what you want.

Mr. Kurtz: Well, I'll be looking forward to reading them but that won't change the issue, Your Honor. You know, I think – you know, this is discovery, Judge. We ought to be able to ask some questions and I'm pleased to provide the court with a detailed factual record about these. These are not things that I'm making up. They are not things that experts divined. They are tied to hard documents prepared by Goodyear.

The Court: It seems to me that the issue has been narrowed after our lengthy conversation to the tests that have been used or were engaged in by Goodyear for the purpose of establishing for their purposes and for consumers that these tires could be used for – based upon the weight and pressure that they have indicated that they were or that they could hold for traveling above 75 or at 75 miles an hour.

Mr. Hancock: At and below Your Honor, thank you.

The Court: At and below. At no more than 75 miles an hour.

(Doc. 201 at 48-49). After further discussion with counsel regarding the appropriate scope of discovery and depositions, the Court made sure Mr. Hancock understood his obligations.

The Court: Is there any question in your mind, Mr. Hancock, what I am going to allow

> in terms of discovery? And that is the deposition questions that I will allow?
>
> Mr. Hancock: Your Honor, I believe the court is saying . . . my witnesses should be deposed about the [testing] done on this [specific] tire with respect to the speed in which it can be operated and what records they have, what records they don't have and what those records show?
>
> The Court: That's exactly right.
>
> Mr. Hancock: Thank you, Your Honor.

(Doc. 201 at 51). Mr. Hancock's statements were misleading.

As evidenced by the early February 2007 email traffic, Mr. Hancock knew about the High Speed tests and knew the tests needed to be produced. This was three months prior to Plaintiffs' Third Request. Thus, Mr. Hancock's in-court statement that the High Speed tests had only recently been requested in May 2007 was misleading and an apparent attempt to obscure the fact that Goodyear had been withholding the tests for approximately four months.

On May 21, 2007, Goodyear deposed Plaintiff's expert, Mr. Osborne. As Mr. Hancock and Mr. Musnuff knew, Mr. Osborne had opined that "no high speed testing of the tire was done." (Doc. 983-1 at 5). As evidenced by their email traffic in early February 2007, Mr. Hancock and Mr. Musnuff both knew high speed testing existed, Plaintiffs' expert's report directly implicated that testing, and the testing needed to be produced. Mr. Hancock and Mr. Musnuff decided to withhold the High Speed tests for at least

three months, and proceed with Mr. Osborne's deposition, knowing that Mr. Osborne was operating under incorrect assumptions and an incomplete record. The only plausible interpretation of this behavior is that Mr. Hancock and Mr. Musnuff decided to delay production of the tests in hopes of gaining a tactical advantage.

Still prior to production of the High Speed tests, the parties filed a notice of yet another discovery dispute. (Doc. 225). That notice recounted a variety of disputes, including a dispute involving Plaintiffs' request that Goodyear provide a 30(b)(6) witness.[8] At the discovery dispute hearing, Plaintiffs began by explaining the main theory of their case:

> Mr. Kurtz: And the tire can't carry the weight of the motor home at [freeway] speed. And it causes the tire to degrade and fail. And we believe – and we're in the middle of this in this case – that that is part of the reason that we saw all these motor home failures with the G159 tire, is that when they get up to freeway speed, they're just not put together to operate in that environment.

(Doc. 243 at 13).

The parties then discussed with the Court the 30(b)(6) issue. Plaintiffs' counsel described the proposed deposition topics as including "the design history of this tire" and "testing for speed and weight." (Doc. 243 at 21). The Court ruled that the 30(b)(6) deposition could occur. (Doc. 243 at 27). The Court also clarified with

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[8] On May 11, 2007, Plaintiffs noticed a 30(b)(6) deposition of Goodyear. The subjects of that deposition were to include the "history of testing of the subject tire for speed capacity and weight capacity during the years of its production." (Doc. 175 at 4).

Goodyear's counsel that the witness would be speaking on behalf of Goodyear. (Doc. 243 at 29).

On June 21, 2007, Goodyear responded to Plaintiffs' Third Request. The responses were provided to Ms. Okey for her explicit approval. (PSOF Ex. 19, 20). Goodyear's responses opened with the same or substantially similar boilerplate objections as those made in response to Plaintiffs' First Request. Goodyear then provided three identical responses to Plaintiffs' three requests for the "speed or endurance testing" Goodyear used to determine the G159 was suitable for use at 65 and 75 mph. That response was:

> Subject to and without waiving the following objections, and in a good faith spirit of cooperation, Goodyear states that it is producing, subject to the Protective Order entered into this case, copies of electronically-maintained high speed durability test results conducted on [G159] production tires since August 1996. After diligent search, to date Goodyear has not been able to locate additional paper records for the tests that are recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Also, after diligent search, to date Goodyear has not been able to locate the paper records for the high-speed durability tests which it conducted on the [G159] tire prior to August 1996, which were not recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Goodyear will supplement this Response

> to produce these paper records if they are subsequently located.
>
> Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome, seeks Irrelevant and Confidential Information.

(Doc. 938-1 at 36).

IX. Repeated Statements that Goodyear Withheld High Speed Tests

Around the same time Goodyear responded to Plaintiffs' Third Request, the Court ordered the parties to "confer and set dates for all remaining depositions and discovery." (Doc. 251). On June 26, 2007, Plaintiffs filed a document stating the parties had complied with the Court's Order by establishing dates to complete discovery. Because a status hearing was scheduled for the near future, Plaintiffs' filing also addressed various discovery problems they were still having with Goodyear. According to Plaintiffs, Goodyear's June 21, 2007 disclosures were the "first time" it had disclosed "evidence which relates to the inability of the subject tire to operate at freeway speeds." Plaintiffs stated they were still waiting for Goodyear to produce additional testing information and they requested the Court "inquire and determine whether additional testing data is in Goodyear's possession to assure that Goodyear's disclosures are complete." (Doc. 256 at 3).

> On June 28, 2007, Plaintiffs submitted a status report. [9] In that report, Plaintiffs stated:

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[9] The docket does not reflect a status report from Goodyear.

> [T]he speed tests . . . were **finally produced last week** by Goodyear. They were originally requested in September of 200[6]. The documents had been in **Goodyear's possession since January 2007** but not disclosed until after Plaintiffs had disclosed their experts' opinions, including rebuttal opinions, and Plaintiffs' expert's deposition was taken.

(Doc. 260 at 2-3). A second status report from Plaintiffs submitted that same day referenced the High Speed tests and alleged: "All of the test data has been the subject of outstanding discovery requests since last September." (Doc. 262 at 2). These repeated statements reflect Plaintiffs' belief that their First Request remained in effect and that the High Speed tests were responsive to the First Request.

On August 9, 2007, the parties filed a joint statement regarding a request to modify the scheduling order. In that document, Plaintiffs stated they were still attempting "to gather information from Goodyear on the design and testing of this tire." (Doc. 301 at 5). In addition, Plaintiffs claimed "Goodyear did not produce any testing on the speed of the tire until June [21], 2007, [10] despite the fact such testing was requested in Plaintiffs' First Request to Produce on September 20, 2006." (Doc. 301 at 6). In response, Goodyear argued Plaintiffs were attempting to "distract[] the Court with a series of red herrings regarding as yet unpresented and inchoate discovery disputes." (Doc. 301 at 7). Goodyear did not provide any substantive response regarding its late disclosure

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[10] The document states June 24, 2007 but from other evidence in the record it appears Goodyear produced the testing on June 21, 2007.

of testing data nor did Goodyear explain that its disclosure of the test data was timely based on Mr. Kurtz withdrawing his First Request in a phone conversation with Mr. Hancock in December 2006. Instead, Goodyear argued the discovery deadline had passed and requested the Court limit the amount of remaining discovery. Without addressing the testing data issue, the Court imposed new discovery deadlines. (Doc. 311).

On September 10, 2007, the parties submitted another joint statement of discovery dispute.[11] (Doc. 319). Plaintiffs were seeking to brief the issue regarding the "proper scope of discovery." Plaintiffs also wished to present "information that Goodyear improperly withheld high-speed test data from the court." (Doc. 319 at 2). On the issue of test data, Goodyear responded: "Nothing suggests this Court has ever ordered production of any test data to it." (Doc. 319 at 5). Goodyear also claimed it had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." This latter statement was misleading.

As of February 2007, Mr. Hancock and Mr. Musnuff knew the High Speed tests were responsive to Plaintiffs' First Request. The statement in the status report that the High Speed tests had been produced in a "timely response to Plaintiff's Third Request" was intended to mislead the Court into believing those tests had been requested *only* in the Third Request. That was plainly not true and contrary to Mr. Hancock and Mr. Musnuff's own knowledge as shown in their emails. Based in part on Goodyear's deception, the Court denied Plaintiffs' request to brief these issues

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[11] That document was not signed by an attorney for Goodyear.

and ordered the parties to comply with prior rulings regarding the appropriate scope of discovery. (Doc. 320).

X. Deposition of Goodyear's 30(b)(6) Witness

On September 12, 2007, Plaintiffs deposed Richard Olsen. Mr. Olsen had been designated as Goodyear's 30(b)(6) witness. Mr. Olsen was asked about the "high speed" tests Goodyear performed on the tire prior to Goodyear determining it could be released as a tire able to perform at speeds up to 75 miles per hour. In particular, Mr. Olsen was given the four High Speed tests which had been turned over to Plaintiffs in June 2007 and was asked whether they constituted the entire universe of such tests.

> Mr. O'Connor (Plaintiffs' Counsel): To the best of your knowledge, [were] only these four high-speed tests available to Goodyear prior to rating this tire as a 75 mile an hour tire[?]
>
> * * *
>
> Mr. Olsen: No.
>
> Mr. O'Connor: What other high-speed tests are available?
>
> Mr. Olsen: I think we talked at length this morning when we first started getting into the high-speed test data that I've spoken with the people who were involved in the release of this tire, and they've confirmed to me that high-speed tests were run in the development process of this tire before it was released to production. We just don't have any paperwork available for that.
>
> Mr. O'Connor: Okay. So there were tests run, but those have either been discarded or

thrown away, and we don't have the results of those tests. Correct?

Mr. Olsen: We don't have them here today, but the people making the decision at that time likely had them available to them at that time.

Mr. O'Connor: Okay. So they had them available, apparently, in 1998 and have somehow discarded them since 1998. Is that what you're trying to tell me?

Mr. Olsen: I'm just saying that they're not available today.

Mr. O'Connor: Okay. So based on the record we have, we only know of four available high-speed tests that we can look at as to whether or not Goodyear could justify speed rating this tire at 75 miles an hour in June of 1998. Correct?

Mr. Olsen: We have four available today to us.

* * *

Mr. O'Connor: **Okay. So there's any – any separate testing that would have been done on this car – on this particular tire, sir?**

Mr. Olsen: **There's a number of different test procedures that are run in the development process of a new tire before it goes into production.**

Mr. O'Connor: **Do we have any of those tests, sir?**

Mr. Olsen: **I don't have them, no.**

Mr. O'Connor: **Are they still available?**

Mr. Olsen: **I don't believe so.**

(Doc. 938-1 at 40-45) (emphasis added).

Mr. Hancock then asked Mr. Olsen some questions based on a document previously examined during the deposition. That document described the High Speed tests produced by Goodyear:

> Mr. Hancock: Okay. The – earlier on, the plaintiffs' counsel asked you about an exhibit . . . it is the test data for high-speed wheel tests performed on this tire. Do you have that?
>
> Mr. Olsen. Yes. . . .
>
> Mr. Hancock: . . . There are other numbered tests that are not on the exhibit. Is that correct? Do you recall the testimony the plaintiffs' counsel asked you about saying, "Well, we don't have tests, for example, 4 through 7," that sort of thing?
>
> Mr. Olsen: Yes, sir.
>
> Mr. Hancock: As far as you know, are all of the tests that were in the databases that were searched that were on the – this, the tire at issue in this case, this specification tire, in that database, in what you have there?
>
> Mr. Olsen: Yes. They're all included here.

(Doc. 938-1 at 40-47).

Based on Plaintiffs' dissatisfaction with Mr. Olsen's testimony, the parties submitted another joint statement of discovery dispute. One of the disputes centered on Plaintiffs' belief that Mr. Olsen "was not

sufficiently knowledgeable" on various topics. (Doc. 345 at 1). Plaintiffs also claimed that Goodyear had not produced "all high-speed testing on the G159 tire and has improperly redacted responsive G159 high speed test results." Goodyear claimed it had "produced all 'high speed testing' data more than three months ago." (Doc. 345 at 3). Goodyear also represented that it had not redacted any tests but it had "simply omitted tests with other tires not at issue in the case, which were *not* part of Plaintiffs' request for the high speed tests ('any speed or endurance testing to determine that the subject tire was suitable for 75 mph highway purposes')." (Doc. 345 at 3). The Court held a hearing on these disputes on October 19, 2007. (Doc. 361).

At that hearing, Mr. Hancock made a number of unequivocal statements. Mr. Hancock averred that "Goodyear has searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). After the Court learned Mr. Olsen may not have been qualified to state that all high speed testing data had been produced, the Court ordered Mr. Hancock to "ask [Mr. Olsen] just to make sure that . . . that everything that relates to the high-speed testing of this tire has been produced." Mr. Hancock responded: "I will do that, Your Honor. I will supplement our record. I believe that to be the case. I have checked with my client and confirmed that that is the case."[12] (Doc. 361 at 46). Mr. Hancock then went on to "flesh out the record." He stated:

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[12] The record does not reflect whether Mr. Hancock asked Mr. Olsen about the High Speed tests but the record is clear that Mr. Hancock did not provide any additional test results after this discussion.

> Goodyear's normal document retention policy means we don't have those records anymore. These are not government-required tests. You don't keep them. . . . So there were tests done. Mr. Olsen can testify about those tests but **there are no documents for him to be questioned about other than the documents that have been produced** and we will supplement with direct confirmation of that.

(Doc. 361 at 47) (emphasis added). After a break, Mr. Hancock affirmed that Plaintiffs had asked for "documents which relate to any speed or endurance testing to determine that the subject tire was suitable for 65 miles per hour." (Doc. 361 at 53). Mr. Hancock affirmed yet again that Goodyear:

> has searched for and produced all of the high-speed testing on this tire. The original discovery request, which is how we got here, were all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced.

(Doc. 361 at 58-59). Mr. Hancock continued: "The discovery request is what did you rely on and tell the public that this tire could go 75 miles an hour? All of that testing has been produced. This tire goes out for sale and we produced all of the testing on any tire that was the same as any of the tires for sale." (Doc. 361 at 63).

All of these statements by Mr. Hancock were seriously misleading. Mr. Hancock knew, as evidenced by his February 2007 email to Mr. Musnuff, that the high speed tests were responsive to Plaintiff's First Request

and they needed to be produced. By repeatedly relying on the tests being responsive only to the Third Request, Mr. Hancock was misleading the Court into thinking that Goodyear had been timely in producing the tests. But more importantly, Mr. Hancock repeatedly represented that there were *no other documents* beyond those already produced. As Mr. Olsen would inadvertently reveal later, Goodyear and its attorneys were concealing a wide variety of other testing documents.

XI. Post-Discovery Activity

Discovery formally ended shortly after the October 2007 hearing and the parties began briefing dispositive motions. The dispositive motions involved a wide array of complicated issues which, for purposes of this Order, are irrelevant. While those motions were pending, Plaintiffs agreed to dismiss Gulf Stream. (Doc. 635). Eventually, the Court issued a lengthy order denying Plaintiffs' motion for summary judgment and denying in part and granting in part Goodyear's motion for summary judgment. (Doc. 651). The Court also granted Spartan's motion for summary judgment, dismissing Spartan from the case. (Doc. 652). Plaintiffs and Goodyear then prepared for trial by inundating the Court with motions in limine and other pretrial filings. The Court devoted substantial time and effort to resolving those motions. (Doc. 842, resolving over thirty motions). On April 14, 2010, the first day of trial, Plaintiffs and Goodyear informed the Court they had reached a settlement. (Doc. 926). As a result, the case was closed.

XII. Other G159 Cases

Having recounted the factual history of this case, the Court must very briefly outline certain events

which occurred in other cases also involving G159 tires.[13] There were three other G159 cases of particular relevance here. Those cases involved actions by some combination of Mr. Hancock, Mr. Musnuff, and Goodyear. The three cases are *Woods v. Goodyear* in Alabama, *Schalmo v. Goodyear* in Florida, and *Bogaert v. Goodyear* in Maricopa County Superior Court. This Court cannot and would not issue sanctions based on actions taken in these other cases. But given that they bear directly on issues presented in this case, it is appropriate to look to them in some detail. *See, e.g., Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992) ("The totality of the circumstances [relevant to a request for sanctions] can include events which did not occur in the case proper but occurred in other cases and are, by their nature, relevant to the pending controversy."). In particular, these other cases are relevant when determining the

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[13] Goodyear has been subject to a number of suits involving the G159 tire. According to a list provided by Plaintiffs, Goodyear was first sued regarding the G159 in 1999. (Doc. 938-1 at 83). Given this long history of litigation, it is surprising that Goodyear did not even begin to look for certain testing information until January 2007 when Mr. Musnuff made a request based on the *Haeger* case. Mr. Musnuff's internal correspondence hints, but does not establish, that he knew about other testing long before January 2007. In his January 11, 2007 email to Mr. Hancock, Mr. Musnuff states "perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds." (PSOF Ex. 8). If Mr. Musnuff actually did not know any other tests existed, his email musing that "perhaps we need to supplement" is, to say the least, a strange way of phrasing the matter. But it is possible Mr. Musnuff's current claim that he first went looking for test data in January 2007 is true because Goodyear's obstructive discovery practices prior to 2006 were successful in keeping the additional testing concealed. (Doc. 1014 at 120).

credibility and state of mind of individuals involved in the present case.

A. *Woods v. Goodyear*

Woods v. Goodyear involved an accident with a Monaco Diplomat motor home and was filed in Alabama. (Doc. 938-1 at 84). Mr. Musnuff worked directly on the case in his role as national coordinating counsel. Sometime prior to July 2007, the *Woods* plaintiffs served on Goodyear their "Fifth Request for Production of Documents." That request sought, among other things: "All other testing conducted by Goodyear . . . that was undertaken, at least in part, to determine the suitability of [G159] tires to be driven at 65 mph." (Doc. 992-1 at 100). Goodyear's "Responses and Objections to Plaintiffs' Fifth Request for Production of Documents" were very similar to the responses served in *Haeger*. Those responses started out with sixteen general objections and then individual objections incorporating the general objections. Upon receiving Goodyear's responses, plaintiffs' counsel in Woods sent a letter asking Goodyear to "reconsider" its objections. Goodyear did not and the parties presented the issue to the court.

In late August 2007, the judge handling the *Woods* case resolved the discovery dispute. The court began by noting the case had "been pending for over 3 years and [had] been marked by disagreements over production of documents on first one issue then another." The court said it was "disgusted with the whole thing" and ordered Goodyear "to produce to the Plaintiff every document requested regarding the [G159] tire." (Doc. 992-1 at 127).

After receiving this order, Mr. Musnuff sent an email to numerous individuals at Goodyear explaining

the judge had required Goodyear to "fully and completely respond to the Requests for Production." (PSOF Ex. 23). Mr. Musnuff included a "plan of action for responding to each RFP" and a "list of documents that need to be assembled for production in order to comply with the court's ruling." (PSOF Ex. 23). As recounted by Mr. Musnuff, the *Woods* plaintiffs' request number 7 sought:

> All other testing conducted by Goodyear of its [G159] tire that was undertaken, at least in part, to determine the suitability of such tires to be driven at 65 mph without an undue risk of tread or belt edge separations.

Mr. Musnuff included a comment regarding this request:

> We will need to produce documents regarding ALL types of testing of the [G159] tire. That is the unfortunate reality of the judge's decision. **We already have the high speed test data**, but we should go through the release checklist and identify all available testing data. We have already produced the W84 Test Protocol in other litigation. We have not previously produced the protocol set forth in the Master Specification, but we need to consider whether it serves our best interest to produce it.[14]

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[14] Stating "we need to consider whether it serves our best interest to produce" an otherwise responsive document reflects precisely Goodyear's attitude toward its discovery obligations. Rather than conveying a concern that all responsive documents be produced, Mr. Musnuff's statement conveys that Goodyear's primary interest was to produce only those documents which would be in Goodyear's "best interest."

(PSOF Ex. 23, August 20, 2007 email) (emphasis added).

One week later, Goodyear employee Sherman Taylor responded by stating, "Below are the responses to [RFP] # 7." (PSOF Ex. 24). Mr. Taylor attached the following documents:

- DOT FMVSS-119 Extended Certification
- Heat Rise test;
- Bead durability test;
- Crown durability test;
- W16 test;
- W64 test;
- G09 test; and
- L04 test.

That email was sent to Mr. Musnuff and Goodyear engineer Jim Stroble. There is no record that Mr. Stroble subsequently clarified that Mr. Taylor's email was wrong. And, presumably relying on Mr. Taylor's opinion, Mr. Musnuff later supervised the production of the Heat Rise tests and the other tests listed.

The following point is critical and must be emphasized. As of August 27, 2007, Mr. Taylor and Mr. Musnuff knew that all of the tests listed in Mr. Taylor's email were responsive to a request for those tests which Goodyear conducted "to determine the suitability of [the G159] to be driven at 65 mph." This is in direct conflict with the position Mr. Musnuff and Goodyear adopted in the present case. According to Mr. Musnuff and Goodyear, their position in the present case was based on a belief that *only* the High Speed tests were responsive to Plaintiffs' request for:

"All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." Mr. Taylor's email shows Mr. Musnuff and Goodyear previously believed many other tests were responsive to such a request.

B. *Schalmo v. Goodyear*

Schalmo v. Goodyear involved an accident with a Fleetwood motor home and was filed in Florida. (Doc. 938-1 at 84). Again, Mr. Musnuff worked directly on the case in his role as national coordinating counsel. During discovery, the *Schalmo* plaintiffs' sought "all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc. 992-1 at 4). In April 2008, Goodyear responded to this request with a list of over twenty-five tests. Included in those tests were the Heat Rise tests. (Doc. 992-1 at 5).

Just as in the *Woods* matter, Goodyear's discovery response in *Schalmo* was an affirmative statement that the Heat Rise tests were responsive to a request for the testing Goodyear had used to determine the "appropriate speed rating, Load Range, and/or vehicle application of the G159 tires." As with *Woods*, the position taken in *Schalmo* is inconsistent with that taken in the present case. Rather than merely concede the response in the current case was inaccurate, Mr. Musnuff and Goodyear now claim the response in *Schalmo* was inaccurate.[15]

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[15] This position also means Goodyear's document production in *Woods* was wrong.

According to Mr. Musnuff and Goodyear, when local counsel in *Schalmo* responded to the discovery request, he simply listed the same test data for each request for production, even though each of the tests listed was not responsive to each request.[16] As stated by Mr. Musnuff's current counsel, "the fact that the same lists were included with the responses to the first three discovery requests did not indicate that each listed test was responsive to each specific type of data requested." (Doc. 1000 at 3). Neither Goodyear nor Mr. Musnuff gives an acceptable explanation why, after being so precise in its discovery responses elsewhere, Goodyear suddenly decided to produce documents in this manner. Mr. Musnuff has attempted to explain that the *Schalmo* discovery response was complicated by Florida law and the need to submit certain documents for *in camera* review prior to production. That explanation is senseless. Even assuming Florida law requires extra procedures, there is no requirement in Florida law that litigants provide grossly inaccurate discovery responses.

A final point regarding *Schalmo* involves Mr. Musnuff's admission that the Heat Rise tests were a type of "durability test." On May 8, 2009, Mr. Musnuff emailed Goodyear engineer Jim Stroble to discuss the Heat Rise tests. That email states "plaintiffs in Schalmo are now trying to cite our Heat Rise Testing as evidence that the tire is defective for generating

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[16] In fact, Mr. Musnuff goes further and states that some of the testing provided in *Schalmo* was not responsive to any of the requests. (Doc. 1000 at 9). It is strange and troubling that Mr. Musnuff expresses no concern that in a litigation he was supervising, discovery responses were served which allegedly provided clearly misleading lists of documents, including totally non-responsive documents.

excessive temperatures." As recounted by Mr. Musnuff, the *Schalmo* plaintiffs were "highlight[ing] the Heat Rise testing **taken during the durability testing of the G159.**" (PSOF Ex. 34) (emphasis added). Thus, as of May 2009, Mr. Musnuff knew the Heat Rise tests were a type of durability testing and that plaintiffs suing Goodyear in a G159 motor home case believed the Heat Rise tests were of great significance.

C. *Bogaert v. Goodyear*

Bogaert v. Goodyear involved an accident with a Fleetwood motor home and was filed in Maricopa County Superior Court in 2005. (Doc. 938-1 at 84). Goodyear was represented by Mr. Hancock as local counsel and Mr. Musnuff served as national coordinating counsel. As with all the other Goodyear cases which have been brought to the Court's attention, the *Bogaert* matter involved extreme difficulty in convincing Goodyear to produce documents. In early 2008, dissatisfied with Goodyear's discovery responses, the *Bogaert* plaintiffs filed a motion to compel. (Doc. 992-1 at 49). On March 20, 2008, the discovery special master ordered Goodyear to "produce the requested documents." (Doc. 992-1 at 66). In particular, Goodyear was ordered to produce the "testing conducted by Goodyear of its [G159] tires that was undertaken, at least in part, to determine the suitability of such tires to be driven at 65 mph without an undue risk of tread or belt edge separations." (Doc. 992-1 at 70). This was *identical* to the discovery request in *Woods* that led Mr. Taylor to list as responsive the various tests, including the Heat Rise tests.

On June 5, 2008, Mr. Musnuff emailed Mr. Hancock regarding the *Bogaert* case. That email stated, in relevant part:

> In meeting with [Goodyear Engineer] Jim Stroble yesterday, we came to conclude that we might be best served by producing data from additional tests of the Subject Tire.[17] As you know, we have produced the available electronically maintained high-speed test data in this case (and in Haeger and Haley [another G159 case] as well) along with the current protocol.
>
> One of the 30(b)(6) topics relates to testing done to make sure the tire was suitable for RV usage. There was no testing specifically done on RVs, **but our whole testing package was to ensure that the tire was suitable for over-the-road applications, including RV.**
>
> In the Woods case, we were compelled to produce other testing data/protocols in addition to High Speed. There, we produced **(i) extended DOT testing data, (ii) heat-rise test data, (iii) bead durability (aka Runflat) test data, and (iv) crown durability test data**, along with the current (evergreen) protocol for each of those tests. . . .
>
> Jim thinks that it may be helpful to produce these documents so that he can review them

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[17] As with his email in the *Woods* case, Mr. Musnuff was concerned with what would "best serve[]" Goodyear's interests rather than producing responsive documents.

> in preparation for his deposition. That seems ok with me. Do you agree? Thoughts?

(PSOF Ex. 31) (emphasis added). The first bolded portion above is a statement by Mr. Musnuff that as of June 5, 2008, he believed Goodyear's "whole testing package" was done to ensure the G159 was "suitable for over-the-road applications, including RV." That testing package included the Heat Rise tests. And the second bolded portion shows Mr. Hancock knew as of June 5, 2008 that "extended DOT testing data," "heat-rise test data," "bead durability . . . test data," and "crown durability test data" existed and it had been produced in another G159 case. Mr. Hancock responded to the email with "Let's discuss." Three months later, Mr. Hancock asked "Basil–Did you come to a conclusion on this?" And one month after that, Mr. Hancock said "Need to discuss this." The Heat Rise tests were never produced in *Bogaert*.

The history of *Bogaert* establishes three critical facts. First, *Bogaert* was filed in Arizona state court in 2005. Under Arizona Rule of Civil Procedure 26.1, Goodyear had affirmative disclosure obligations. Mr. Hancock claims to have explained these affirmative disclosure obligations to Mr. Musnuff but Mr. Musnuff now claims that prior to early 2007, he "was unaware of any test records relating to the G159 tire other than the DOT test data" Goodyear produced in every case. (Doc. 983-1 at 6). Mr. Musnuff stated under oath that he only started looking for test results in January 2007. Thus, the present record is clear that either Mr. Hancock did not explain Rule 26.1 or Mr. Musnuff and Goodyear chose to ignore it. Either way, Goodyear and its attorneys clearly had no interest in complying with their discovery obligations unless those obligations

were in the "best interest[s]" of Goodyear. (PSOF Ex. 23, August 20, 2007 email) (emphasis added).

The second fact that the *Bogaert* record establishes is that long after its responses were served in the present case, Mr. Musnuff believed Goodyear's "whole testing package" was to ensure the suitability of the G159 for "over-the-road applications." That testing package included the Heat Rise tests, the extended DOT test, crown durability test, and the bead durability test. Therefore, prior to the present sanctions proceedings, Mr. Musnuff was of the opinion that *all* of these tests were responsive to a request for the data Goodyear used to determine the G159's suitability for use "over-the-road." In other words, in June 2008 Mr. Musnuff was of the opinion that the Heat Rise tests, extended DOT test, the bead durability test, and the crown durability test were responsive to Plaintiffs' Third Request.

And the third fact established by the *Bogaert* record is that no later than June 5, 2008 Mr. Hancock knew of the existence of additional test data not produced in the present case. While there is no evidence that Mr. Hancock actually had copies of the underlying test results referenced in Mr. Musnuff's email, he knew that the tests existed and he either knew or should have known that the disclosures in the present case had been woefully inadequate.

Viewed together, Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. As explained below, this means Goodyear, Mr. Hancock, and Mr. Musnuff knowingly concealed crucial documents in the present litigation.

XIII. Plaintiffs' Counsel Writes to Goodyear About Undisclosed Tests

Close to one year after the present case settled, Mr. Kurtz wrote to Mr. Musnuff and stated he had "great concern regarding the adequacy and honesty of the disclosures made" in this case. (Doc. 938-1 at 49). This concern was based on a newspaper article regarding *Schalmo*. That case had proceeded to trial and resulted in a 5.6 million dollar award against Goodyear. (Doc. 938-1 at 12). According to the newspaper article, during trial the *Schalmo* plaintiffs had presented "Goodyear documents including internal heat and speed testing and failure rate data." (Doc. 938-1 at 12). Mr. Kurtz observed that no such data was produced in this case and he asked Mr. Musnuff whether such records actually exist. In response, Mr. Musnuff stated "Goodyear stands behind its discovery responses in the *Haeger* case, and we stand behind the properly-stated objections to the scope of the discovery requests propounded by the plaintiffs in this case." (Doc. 938-1 at 53). Mr. Kurtz then emailed Goodyear's counsel, asking for a direct answer whether "internal heat test records" existed. (Doc. 938-1 at 56). Mr. Musnuff responded that it would not be "productive to debate these issues further." (Doc. 938-1 at 56).

Mr. Kurtz sent a follow-up letter, which Mr. Musnuff responded to by claiming Mr. Kurtz' allegations were "unprofessional and without merit." (Doc. 938-1 at 66). Mr. Musnuff stated Goodyear had "abided by all of Judge Silver's rulings and we take issue with any suggestion that we were disrespectful or misled the court in any manner or that we failed to comply with any of her rulings in this case." Mr. Musnuff admitted "it is true there are testing records

regarding the [G159] tire that were not produced in the *Haeger* litigation. *That fact was clear during the course of the litigation*, and certainly at the time plaintiffs chose to resolve this case."[18] (Doc. 938-1 at 66) (emphasis added). Mr. Musnuff then offered a disturbing explanation of what happened.

> Plaintiffs propounded a request that Goodyear produce all testing data related to the Subject Tire. However, that did not automatically create an obligation that Goodyear produce all testing data in this case. Goodyear responded to plaintiffs' request by objecting to the scope of the request on several good-faith grounds. . . . Goodyear did produce DOT testing data in response to plaintiffs' request, showing that the Subject Tire was in full compliance with FMVSS 119, but Goodyear objected to the production of any other testing data. We never represented that this DOT testing data comprised the totality of testing done with regarding to the Subject Tire, a fact which you have conceded.

Mr. Musnuff stressed that Goodyear's objections to the First Request did "not set or establish the appropriate

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[18] There is no plausible way to read the record as supporting this contention. It certainly was *not* clear to the Court that Goodyear was withholding documents regarding the G159's performance in "highway" testing. Had it been "clear" to the Court what Goodyear and its counsel were doing, the Court would have immediately ordered disclosure and imposed sanctions for misconduct. To claim this Court would *knowingly* allow Goodyear to withhold relevant and discoverable information is outrageous. In addition, the claim by Goodyear's counsel that Plaintiff's allegations were "unprofessional and without merit" is preposterous. (Doc. 938-1 at 66).

scope of discovery. That is the province of the court." (Doc. 938-1 at 67). Because Plaintiffs never filed a motion to compel regarding "all testing data," Goodyear had no obligation to produce all such data.

Mr. Musnuff also explained that the High Speed tests eventually produced were in response to "additional requests for production" but Goodyear "never represented that this high speed endurance testing data comprised the totality of testing done with regard to the Subject Tire." (Doc. 938-1 at 67). There was no mention in Mr. Musnuff's letter that Mr. Kurtz had withdrawn or narrowed his First Request.

XIV. Plaintiffs File Their Motion for Sanctions

On May 31, 2011, Plaintiffs filed a motion for sanctions based on alleged "discovery fraud." (Doc. 938). Plaintiffs argued Goodyear had "knowingly concealed crucial 'internal heat test' records related to the defective design of the G159." (Doc. 938 at 1). Plaintiffs pointed to their First Request as evidence that they had sought "all test records for the G159 tires." (Doc. 938 at 5). Plaintiffs claimed they had been misled by Goodyear's tactic of objecting and answering the First Request. (Doc. 938 at 8). This led Plaintiffs to believe "that the responsive information [was] being disclosed and Goodyear [was] simply preserving objections." (Doc. 938 at 8).

Goodyear filed a lengthy response to the motion. (Doc. 948). That opposition began with an attempt to recount the history of discovery. As recited by Goodyear, Plaintiffs' First Request sought "all test records." (Doc. 948 at 3). Goodyear admitted it responded to this request by objecting and by providing the DOT test but argued it "never represented that the DOT test data comprised the totality of testing

with regard to the G159 tire." (Doc. 948 at 3). Goodyear next explained that the High Speed tests it did produce were in response to the Third Request. (Doc. 948 at 3-4). According to Goodyear, the tests Plaintiffs were now referencing, *i.e.*, the Heat Rise tests, did not qualify as "high speed testing" responsive to the Third Request and, therefore, were not produced. (Doc. 948 at 4). This last statement requires detailed scrutiny.

Plaintiffs' Third Request sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." Goodyear's response to the motion for sanctions argued the Heat Rise tests were not responsive because they were "not high speed testing at all." (Doc. 948 at 4). As a preliminary matter, Goodyear's response is confusing given that the Third Request did not seek "high speed testing." It sought documents which related *to any* speed or endurance testing to determine the G159 was suitable for highway purposes; a test conducted at low speeds would be responsive to this request. Thus, Goodyear's claim that it did not need to produce the Heat Rise tests in response to the Third Request because the Heat Rise tests were not "high speed testing" was, in large part, a non-sequitur. But even more importantly, Goodyear's opposition to the sanctions motion did not argue the tests were non-responsive due to Goodyear's decision not to rely on them as proof the G159 was suitable for highway use. That is, Goodyear argued only that the "internal heat tests" were not "high speed testing;" it did not argue the tests were withheld because Goodyear had not relied on them to determine suitability for highway purposes. As set forth later, the failure to make this argument is telling.

Finally, Goodyear's opposition to the sanctions motion claimed its behavior during discovery had "unambiguously indicat[ed] that it would not produce *all* test data." (Doc. 948 at 4). The Court is at a loss to determine what Goodyear believed was an "unambiguous" indication that it was withholding certain tests performed on the G159 tire. Both Plaintiffs and the Court were unable to perceive this "unambiguous" indication and Goodyear's statement is incredibly inaccurate. Throughout the numerous discovery dispute filings and hearings, the Court was under the impression that Goodyear had produced *all* test data relevant to Plaintiffs' claims.[19] In fact, at various points the Court became exasperated with Plaintiffs' apparently unsubstantiated claims that additional information must exist. Based on personal observation and discussions with Mr. Hancock during in-court hearings, the Court came to believe Mr. Hancock thoroughly understood his discovery obligations and that he was making every effort to comply with them. There simply was no reason for the Court to question Mr. Hancock's representations and Plaintiffs' repeated attempts to cast aspersions on Mr. Hancock appeared misguided. Of course, now that Goodyear has been forced to admit additional information does exist, that exasperation was misplaced. Suffice it to say, had there ever been an "unambiguous" indication that Goodyear was withholding certain test data, the Court would have immediately addressed it and taken appropriate action.

Before filing their reply, Plaintiffs asked the Court to order Goodyear to produce "the requested tests."

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[19] According to the Court's calculations, the parties spent approximately sixteen hours in court on discovery matters. This is an extraordinary amount of time.

(Doc. 949 at 2). Goodyear opposed that motion and argued it should not have to produce the "heat test" documents because "Goodyear has committed no discovery violation." (Doc. 951 at 4). On October 5, 2011, the Court concluded there were "serious questions regarding [Goodyear's] conduct in this case" and, based on the Court's power to conduct an independent investigation, ordered Goodyear to produce "the test results at issue." (Doc. 954 at 1). Goodyear produced the Heat Rise tests but kept numerous other tests concealed. After obtaining the Heat Rise tests, Plaintiffs filed their reply and explained the importance of the tests. (Doc. 963). Spartan subsequently joined the motion for sanctions, arguing it also suffered harm as a result of Goodyear's alleged misconduct. (Doc. 966).

XV. Explanation of Undisclosed Test Results

The initial motion for sanctions centered on the Heat Rise tests. Those tests are titled "Laboratory Durability Testing–Heat Rise" and were conducted on four G159 tires on April 21, 1996. The tests were meant to "determine the dynamic heat build-up at specific loads, speeds, and inflations." (Doc. 963-1 at 7). The Heat Rise tests were conducted on a "67.23 [inch] diameter flywheel" and consisted of running the tires at 35 miles per hour and checking the temperature of the tire at certain intervals. (Doc. 963-1 at 7). The Heat Rise tests describe 35 miles per hour as reflecting "highway use." Even though 35 miles per hour seems substantially slower than highway speeds, the rationale for this description is explained by Goodyear's 30(b)(6) witness. Testing a tire on a 67-inch flywheel places "upwards of double the speed" impact on a tire as the tire impact of "a vehicle on a road surface." In other words, "if you run 45 miles an hour on the steel flywheel [that] is the equivalent

temperaturewise of 70, 80 miles an hour on the public highway as far as the heat history goes." (Doc. 963-1 at 61). Under this logic, testing tires at 35 miles per hour on a flywheel would be the equivalent of 55-65 miles per hour on the highway.

According to the Heat Rise tests, after running at 35 miles per hour, the G159 tires generated temperatures of up to 229 degrees. The parties now dispute whether these temperatures were cause of concern. Plaintiffs have cited to Goodyear's internal documents, Goodyear's expert, and Goodyear's 30(b)(6) witness as stating this temperature was sufficiently high to be cause for concern. Goodyear counters that these temperatures were no more damning than other evidence already in Plaintiffs' possession. Whether Plaintiff or Goodyear is correct, it is clear that Plaintiffs believe the Heat Rise tests would have been helpful to their case. And regardless of the position now adopted by Goodyear and its counsel, there can be no serious dispute that the Heat Rise tests were relevant to Plaintiffs' claims.

XVI. Court's Preliminary Order

On February 24, 2012, the Court issued "Proposed Findings of Fact and Conclusions of Law." (Doc. 970). After recounting the behavior by Goodyear and its counsel, the proposed order concluded sanctions were appropriate. The proposed order focused on Goodyear's failure to produce the Heat Rise tests and the repeated statements by Mr. Hancock that all responsive documents had been produced.

The proposed order first concluded the First Request seeking "all tests" remained in place and Goodyear's attempt to respond by objecting and providing a limited set of documents was inappropriate. (Doc.

970-1 at 18). Therefore, the Heat Rise tests should have been produced in response to the First Request. Next, the proposed order recounted that the Heat Rise tests also were responsive to the Third Request where Plaintiffs sought "documents which relate to any speed or endurance testing to determine that the [G159] was suitable for [65 and 75] mph highway purposes." (Doc. 970-1 at 18-19). The proposed order focused on the argument made by Goodyear that the Heat Rise tests did not qualify as "high speed testing." The Court rejected this position because Plaintiffs had never limited their request to "high speed testing." Moreover, the Heat Rise tests themselves were labeled as "highway testing," meaning they easily qualified as "high speed testing." In fact, the Court preliminarily concluded the tests were "*obviously* responsive" to a request for testing to determine suitability for "highway purposes." (Doc. 970-1 at 22). The Court did not address, because Goodyear did not argue, that the Heat Rise tests were not responsive because Goodyear had not relied on them when determining the G159's suitability for highway use.

The proposed order noted that despite clear evidence that someone had behaved inappropriately, the record was not sufficiently clear to determine who was "responsible for each instance of misconduct" nor was it sufficiently clear to determine "the appropriate amount to be awarded." (Doc. 970-1 at 23). The Court directed Goodyear and its counsel to "file either joint or separate briefs" addressing the proposed order. (Doc. 970).

XVII. Briefing After Preliminary Order

Based on the proposed order, Mr. Hancock, Mr. Musnuff, and Goodyear retained new counsel and filed separate responses. The contents of that briefing must

be analyzed in some detail to show the different positions adopted by Mr. Hancock, Mr. Musnuff, and Goodyear once they realized that the Court was taking the matter seriously.

A. Mr. Hancock's Response

Mr. Hancock's response focused on the timing of his statements to the Court and his knowledge about the Heat Rise tests. Mr. Hancock explained that he "did not see the Heat Rise test until it was ordered to be produced following Plaintiffs' Motion for Sanctions" and he was not involved in any discussions to determine whether the Heat Rise tests were responsive to a discovery request. (Doc. 980 at 3). Mr. Hancock claimed it would be inappropriate to sanction him for any of his in-court statements because, at the time he made the statements, he did not know they were false.

B. Mr. Musnuff's Response

Mr. Musnuff's response focused on the fact that he allegedly held a good faith belief that the Heat Rise tests were not responsive to Plaintiffs' Third Request. According to Mr. Musnuff, as of early 2007 Goodyear's only outstanding discovery obligation was to respond to Plaintiffs' Third Request.[20] (Doc. 983 at 5). As allegedly understood by Mr. Musnuff, Plaintiffs' Third Request was limited to those tests which Goodyear relied upon "to determine suitability of the G159 for 65 and 75 miles per hour." (Doc. 983 at 8). Allegedly based on conversations with Goodyear employees, Mr. Musnuff came to believe that the *only* testing data Goodyear relied upon to determine suitability were the

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[20] This is misleading as Mr. Musnuff's January 11, 2007 email to Mr. Hancock admitted Goodyear might need to supplement its prior responses "to show the testing of this tire at various speeds."

High Speed tests which were produced to Plaintiffs in June 2007.

Somewhat bizarrely, Mr. Musnuff's response also argued that the objections which accompanied the responses to Plaintiffs' Third Request were "asserted for technical reasons only, and [were] not indicative that additional responsive documents were located." (Doc. 983-1 at 8). In his letters to Mr. Kurtz before the sanctions motion was filed, Mr. Musnuff had repeatedly taken the position that the objections to the First Request *were* an indication that other documents existed. Thus, Mr. Musnuff seemed to be arguing Plaintiffs should have realized Goodyear's objections to the First and Third Requests were conveying precisely opposite positions. Mr. Musnuff provided no explanation how Plaintiffs should have arrived at this conclusion.

C. Goodyear's Response

As with Mr. Musnuff's response, Goodyear's response focused on its position that it did not use the Heat Rise tests to determine the G159 was suitable for highway purposes. Accordingly, Goodyear argued that the Heat Rise tests were not responsive to Plaintiffs' Third Request. Goodyear made no serious attempt to explain why the Heat Rise tests were not produced based on Plaintiffs' First Request. Instead, Goodyear merely noted that it had objected to the First Request. (Doc. 984 at 4). Goodyear also argued there was no deliberate strategy to conceal the Heat Rise tests because it produced the Heat Rise tests in two other cases where the plaintiffs "sought 'heat testing' or . . . obtained a Court order compelling production of 'all tests.'" (Doc. 984 at 7).

Goodyear's response was supported by the declaration of Ms. Okey. According to that declaration, the Heat Rise tests were "produced in the *Woods* case in August 2007 in response to a court order requesting production of *all* tests. Moreover, the same report was produced in the *Schalmo* case in August 2008, where the plaintiffs specifically sought discovery relating to, among other things, heat testing." (Doc. 984-1 at 5). These two statements were either misleading or false.

First, there was never an order in the *Woods* case requiring the production of "*all* tests." Instead, the order required Goodyear to "produce to the Plaintiff every document requested" in the plaintiffs' Fifth Request for Production of Documents. (Doc. 992-1 at 127).That request did not contain a request for "all tests" and Ms. Okey's statement to the contrary is wrong. The decision to submit a written declaration containing such a statement–a situation where careful review and drafting is possible–shows an unfortunately casual attitude to the issues presented by Plaintiffs' motion.

And second, Ms. Okey's statement regarding the *Schalmo* case may not qualify as false but it is at least a deliberate attempt to mislead. As explained earlier, Goodyear's responses to the discovery requests in *Schalmo* specifically listed the Heat Rise tests as responsive to a request for "all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc. 992-1 at 4). Ms. Okey, perhaps hoping the Court would not look to the underlying documents, makes no effort to explain the situation in *Schalmo* or that the Heat Rise tests were not produced *only* in response to a request for "heat testing." Again, Ms. Okey's casual attitude to

the underlying facts in *Schalmo* do not reflect well on her or Goodyear.

Finally, in making its various arguments against the proposed order, Goodyear inadvertently disclosed that there were *other* tests which it had not disclosed in this case. In its response, Goodyear attempted to explain that it gave Mr. Musnuff "the only W84 high speed test data [it] was able to locate." (Doc. 984 at 6). In a footnote, Goodyear provided further context, stating it "produced 16 different high speed test results, but 12 of those test results were performed in 2000 and relate to G159 Series tires used by NASCAR. Moreover, Goodyear also produced several crown durability, bead durability and DOT endurance tests." (Doc. 984 at 6). In support of this latter statement, Goodyear cited to a declaration by Richard J. Olsen, the individual Goodyear had used as its 30(b)(6) witness. (Doc. 984-1 at 13).

In his declaration, Mr. Olsen tried to explain how his testimony during his deposition was accurate but, in doing so, Mr. Olsen accidentally revealed it was not. Mr. Olsen's declaration stated that during his deposition, he had been "asked if there [were] 'any separate testing' besides the tests Goodyear produced, which included DOT tests, crown durability tests, bead durability tests and high speed tests." (Doc. 984-1 at 17). During the deposition, Mr. Olsen had responded "that a number of different tests are run in the development process but they could not be found." (Doc. 984-1 at 17). Because Mr. Olsen apparently believed that Goodyear had disclosed "crown durability tests, bead durability tests and high speed tests," his deposition testimony that no other testing existed was, in his mind, accurate. Mr. Olsen's

declaration stated he stood by that deposition testimony. (Doc. 984-1 at 17). Unfortunately for Mr. Olsen, his deposition and declaration were both false.

Four days after filing Mr. Olsen's declaration, Goodyear filed a "Notice of Correction." That notice stated "the crown durability, bead durability and DOT endurance tests were not produced in this case." (Doc. 989 at 2). The notice provided no explanation why Mr. Olsen had submitted a false declaration here or how Mr. Olsen's deposition testimony could be viewed as accurate given that other tests existed. In fact, it is no longer possible that Mr. Olsen's deposition testimony was even close to accurate.

The present record shows that Mr. Olsen knew about "the crown durability, bead durability, and DOT endurance tests" at his deposition. Those tests had not been produced to Plaintiffs. During his deposition, he was asked if there was "any separate testing that would have been done on this . . . particular tire" other than that already produced by Goodyear. Mr. Olsen responded there were other tests, but he did not have them. That was false. He was then asked if the other tests were still available. He stated "I don't believe so." That was false. In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity emerged only as a result of Goodyear's inability to keep its falsehoods straight. A responsible corporation would have corrected the false deposition testimony immediately after the fact. At the very least, a responsible corporation would not compound the problem by submitting a false declaration affirming the false deposition testimony. Goodyear has not offered an explanation for Mr. Olsen's testimony or its own inexplicable behavior. The only reasonable conclusion

is that Goodyear was, and continues to be, operating in bad faith.

XVIII. Additional Briefing

Dissatisfied with Mr. Hancock, Mr. Musnuff, and Goodyear's inability to provide clear answers on certain issues, the Court directed additional briefing addressing five questions. This briefing included further evolution of certain positions.

A. Production in Schalmo

The first question the Court asked was why Goodyear produced the Heat Rise tests in *Schalmo* but withheld them in *Haeger*. (Doc. 995 at 1). Goodyear and Mr. Musnuff responded that the *Schalmo* responses were prepared by Florida counsel and neither Mr. Musnuff nor anyone at Goodyear knew, in particular, why the Heat Rise tests were produced. (Doc. 1000 at 3; Doc. 1001 at 3). Mr. Hancock claimed he had not been involved in *Schalmo* and could not opine on anything that happened in that case. (Doc. 999 at 11).

Mr. Musnuff and Goodyear's inability to provide a reasonable explanation for the differences between *Schalmo* and *Haeger* is telling. Given the attempt to shift the blame to Florida counsel, it is manifestly clear the *Schalmo* disclosure was a result of Goodyear inadvertently giving the Heat Rise tests to local counsel and that counsel then producing the tests, unaware that Goodyear did not want to produce them (allegedly because they were totally irrelevant and conducted for no reason).

B. Other Tests

The second question posed by the Court was whether the "'crown durability, bead durability and

DOT endurance test reports' should have been produced" in the present case. (Doc. 995 at 2). Mr. Musnuff responded that they "should *not* have been produced in the *Haeger* litigation" because they were not responsive to Plaintiffs' Third Request. (Doc. 1000 at 10). Goodyear also maintained that they were not responsive to Plaintiffs' Third Request. (Doc. 1001 at 4). Goodyear admitted, however, that "if Plaintiffs' First Request for Production remained operative," the tests "should have been produced." (Doc. 1001 at 5). Mr. Hancock responded that he had "no knowledge concerning these new tests, the purpose of these tests, or what these tests represent." (Doc. 999 at 12). These positions present a dizzying array of misstatements and simple falsehoods.

The positions argued by Mr. Musnuff and Goodyear cannot be reconciled with the facts. As evidenced by the proceedings in *Woods*, both Mr. Musnuff and Goodyear (through its employees), knew the Heat Rise tests, the crown durability test, the bead durability test, and the DOT endurance tests were all responsive to a request for the testing Goodyear used to determine the G159's suitability. Thus, all these tests were responsive to Plaintiffs' Third Request. Mr. Musnuff also knew these tests were responsive to Plaintiffs' First Request. Moreover, the record demonstrates that Mr. Musnuff believed the First Request remained in place and Goodyear's admission that these documents should have been produced in response to that request means Mr. Musnuff deliberately withheld these responsive documents in the "best interest[s]" of Goodyear. It is only now, after having been caught withholding the documents, that Mr. Musnuff is formulating his convoluted argument that he withheld them because they were not responsive to the Third Request. And while Goodyear can be commended for

its candor in admitting these tests are responsive, it failed to provide any explanation why its 30(b)(6) witness testified falsely at his deposition that no tests other than those already produced to Plaintiffs existed.

As for Mr. Hancock, his claim that he did not know about these additional tests is false. As shown by the email from Mr. Musnuff to Mr. Hancock in the Bogaert matter, Mr. Hancock *did* know about these tests and *did* know they were part of Goodyear's "whole testing package" to determine the G159 was suitable for "over-the-road" use.

C. Heat Rise Tests Conflict with Representations

The third question posed by the Court was whether "the results of the Heat Rise tests conflict with any representation made during" the present case. In response, Mr. Hancock admirably admitted that the mere fact that the Heat Rise tests exist meant some of his statements were incorrect. (Doc. 999 at 12). Mr. Musnuff and Goodyear responded they were unable to determine whether the Heat Rise test results conflict with any representation.

Mr. Musnuff and Goodyear's responses were not good faith responses. At the time they filed their responses, Mr. Musnuff and Goodyear knew that Mr. Hancock had made various in-court statements which were later proven false. For example, Mr. Hancock had represented that Goodyear had responded to all discovery and that no other documents existed. The existence of the Heat Rise tests means that Mr. Hancock's statements were incorrect and Mr. Musnuff and Goodyear's inability to acknowledge that basic fact is disturbing.

D. Party Responsible for Not Producing Heat Rise Tests

The fourth question was who was responsible for not producing the Heat Rise tests. Mr. Hancock responded that he could not be held responsible as he was unaware that the tests existed. Mr. Musnuff claimed he was jointly responsible with Goodyear because Goodyear had informed him that it did not use the Heat Rise tests to determine the G159's suitability for highway use. Thus, based on this information, Mr. Musnuff allegedly decided not to produce the test in response to Plaintiffs' Third Request. Goodyear argued that only Mr. Musnuff should be held responsible because it provided the Heat Rise tests to Mr. Musnuff and it relied on him "to prepare discovery responses, to identify documents responsive to discovery requests and to handle day-to-day management of the *Haeger* case." (Doc. 1001 at 8). In Goodyear's view, there was "no evidence that Goodyear itself acted in bad faith or deliberately concealed G159 Tire test results." (Doc. 1001 at 8). This latter statement is of some interest.

It is now clear that Goodyear's 30(b)(6) witness testified falsely at his deposition regarding the Heat Rise tests, the crown durability test, the bead durability test, and the DOT endurance tests. Therefore, the claim that Goodyear itself did not deliberately conceal *any* "G159 Tire test results" is not true. (Doc. 1001 at 8). In addition, Ms. Okey retained final say regarding discovery responses and she must have known that Goodyear's responses in the present case were grossly inaccurate. Goodyear's attempt to shift blame entirely onto its counsel is not supported by this record.

E. Not Produced in *Bogaert*

The final question posed by the Court was why the Heat Rise tests were not produced in the Arizona state case of *Bogaert v. Goodyear*. Mr. Hancock responded he informed Mr. Musnuff and Goodyear about the "affirmative disclosure obligations under the Arizona Rules of Civil Procedure" but he had no idea the Heat Rise tests even existed at the time *Bogaert* was litigated. Goodyear stated it did not know for certain if the Heat Rise tests had been produced in *Bogaert*. And Mr. Musnuff responded the Heat Rise tests were not produced because the *Bogaert* plaintiffs "sought testing used by Goodyear to determine the tire's suitability for 65 and 75 miles per hour." (Doc. 1000 at 11).

In effect, neither Mr. Musnuff nor Goodyear were able to offer any plausible basis for not producing the Heat Rise tests in *Bogaert*. Mr. Musnuff's explanation that he only produced tests specifically sought by the *Bogaert* plaintiffs in a discovery request shows such a fundamental misunderstanding of his disclosure obligations under Arizona law that it is surprising Mr. Musnuff would assert such a position without some further explanation. *See Norwest Bank (Minnesota), N.A. v. Symington*, 3 P.3d 1101, 1105-06 (Ariz. Ct. App. 2000) (explaining disclosure obligations and specifically rejecting claim that information need only be produced in response to precise discovery request). Mr. Musnuff's failure to acknowledge that the failure to disclose the Heat Rise test in *Bogaert* was improper shows he still has not grasped that his behavior was inappropriate.

Goodyear's position is equally perplexing in that it refuses to admit the obvious, *i.e.* that the Heat Rise tests should have been produced in *Bogaert*. Goodyear's failure to straightforwardly admit that its counsel

committed such an obvious error gives the impression that Goodyear lacks remorse for the mistakes made on its behalf. As with its response to the false testimony by its 30(b)(6) witness, Goodyear is not behaving responsibly.

And finally, Mr. Hancock's response was evasive in that the record now establishes Mr. Hancock knew of the Heat Rise tests (and other tests) while *Bogaert* was being litigated. There is no explanation for Mr. Hancock's willingness to aid Mr. Musnuff and Goodyear in flouting Arizona's disclosure rules.

XIX. Evidentiary Hearing

The Court held an evidentiary hearing on March 22, 2012. At that hearing, Mr. Musnuff and Mr. Hancock testified. Mr. Musnuff's testimony conflicted with the documentary evidence and was not credible. Mr. Hancock's testimony, while more reliable than Mr. Musnuff's, still conflicted with the underlying evidence and was not entirely credible.

A. Mr. Musnuff's Testimony

Mr. Musnuff's testimony covered a variety of topics, including his explanation for when he first received the Heat Rise tests and what he understood the Heat Rise tests to mean. Despite the written declaration by Mr. Taylor that he gave the Heat Rise tests to Mr. Musnuff in January 2007, Mr. Musnuff testified he first learned of the Heat Rise tests sometime in August 2007. (Doc. 1014 at 97). When pressed, Mr. Musnuff explained that Mr. Taylor's representations that the Heat Rise tests were located and provided to Mr. Munsuff in January 2007 was a mistake. (Doc. 1014 at 122). Moreover, according to Mr. Musnuff, the January 24, 2007 date printed on the Heat Rise tests

was inaccurate and no one could figure out what it meant.

Next, Mr. Musnuff testified that he determined the Heat Rise tests were not responsive to Plaintiffs' Third Request based on statements made to him by "numerous Goodyear engineers" that the tests had "nothing to do with the durability of the tire or its ability to function at highway speeds." (Doc. 1014 at 29). Mr. Musnuff asserted he was "repeatedly told by Goodyear that the only test determined for suitability for 65 and 75 mile an hour highway use was the W84 tests." (Doc. 1014 at 29-30). When asked to explain this in more detail, Mr. Musnuff stated:

> As was explained to me by the Goodyear engineers, the heat rise test is not a test to evaluate the tire itself. It's a compounder's test used to evaluate different compounds that might be used in different tires; or if you're trying to improve a compound or such, you might test one and then test another. You have to test them in something so you test them in a tire, but they're really evaluating the compound rather than the tire.

(Doc. 1014 at 34). The Court could not understand this statement and pressed Mr. Musnuff for a more precise explanation:

> The Court: If one compound is better than one, but the purpose [of the Heat Rise tests] is to improve the quality of the tire; right?
>
> Mr. Musnuff: I would think that all of the engineering that Goodyear does is to ultimately to try to improve the quality of the products.

> The Court: So, then, in essence, then, it does have something to with its endurance or durability because that is, at bottom, what is important to Goodyear; right?
>
> Mr. Musnuff: Well, no. Your Honor, if I can disagree. As it was explained to me, that this is in no way a durability test or an endurance test. . . . It's just to provide – it's like an information point only. . . .
>
> The Court: So if one of the compounds was found . . . to be better than another compound, what would the engineering group do?
>
> Mr. Musnuff: That I don't know.
>
> * * *
>
> The Court: But what was [the Heat Rise test] designed to do?
>
> Mr. Musnuff: Just to provide information that a compounder could look at.
>
> The Court: Was it academic or was it for recreation? What was it for?
>
> Mr. Musnuff: No, not academic but there's no qualified – there's no standard that applies to it. . . . It's just to provide a point of information so that you can compare one compound you're testing verus another compound you're testing.

Mr. Musnuff explained that he talked to Mr. Taylor and Mr. Stroble regarding the Heat Rise tests and they informed him the tests were not responsive because Goodyear had not relied on them when determining the suitability of the G159 for highway use. (Doc. 1014 at 40).

On cross-examination, Mr. Musnuff testified that the Heat Rise tests were not even relevant to Plaintiffs' allegations. (Doc. 1014 at 45). Mr. Musnuff did concede, however, that the Heat Rise tests qualified as "wheel tests" which were requested by Plaintiffs in their First Request. Mr. Musnuff admitted Goodyear never supplemented its responses to the First Request nor did it otherwise alert Plaintiffs that tests were being withheld. (Doc. 1014 at 46, 54). Mr. Musnuff also stated he did not recall questioning why the Heat Rise tests were labeled "durability tests" if they were not, in fact, durability tests. (Doc. 1014 at 50).

Towards the end of the cross-examination, Mr. Musnuff admitted he attended the deposition of Goodyear's expert where that expert expressed the opinion that "heat in excess of 200 degrees for a prolonged period of time . . . can lead to tread separations." (Doc. 1014 at 79). Despite the fact that the Heat Rise test established the G159 "was running at 229 degrees," Mr. Musnuff maintained it was utterly irrelevant because the Heat Rise test had "nothing to do with measuring the durability of the tire." (Doc. 1014 at 80).

After all counsel concluded their questioning of Mr. Musnuff, the Court asked a series of questions. First, the Court asked why the Heat Rise tests were turned over in *Schalmo* but not in *Haeger*. Mr. Musnuff explained that he came to believe Mr. Kurtz had narrowed his discovery request such that the Heat Rise tests were not responsive to any outstanding request. (Doc. 1014 at 128-29). Next, the Court asked why there were no efforts to locate any testing before January 2007. Mr. Musnuff explained that there had been no case before 2003 that "required . . . production

of further testing beyond the compliance testing" Goodyear routinely produced. (Doc. 1014 at 131). Third, the Court confirmed Mr. Musnuff had been present for the depositions of the various experts. (Doc. 1014 at 133). Mr. Musnuff confirmed that he was present for Goodyear's expert's deposition and that the expert had stated "anything over 200 [degrees] could cause separation." (Doc. 1014 at 134). Despite the Heat Rise tests casting serious doubt on this opinion, Mr. Musnuff stated he had behaved properly because the Heat Rise tests were not responsive to any discovery request. When the Court expressed some confusion how Mr. Musnuff believed it was proper for him to allow Goodyear's expert to provide testimony directly undercut by Goodyear's own testing, Mr. Musnuff repeated that the Heat Rise tests had absolutely no practical application other than providing a "data point" to compare two compounds. (Doc. 1014 at 137). The results of the Heat Rise tests "mean[] nothing, essentially nothing in terms of durability on the road." (Doc. 1014 at 139).

Finally, the Court confirmed that the Heat Rise tests had been used during the *Schalmo* trial to show the G159 was defective. (Doc. 1014 at 138). Based on a question from Plaintiff's counsel, Mr. Musnuff confirmed that in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had "said the tire would foreseeably fail at [temperatures] above 200 degrees." (Doc. 1014 at 144). Based on the entire record, Mr. Musnuff's testimony was not credible.

To begin, the Court concludes Mr. Musnuff received the Heat Rise tests in January 2007. As stated by Mr. Taylor, the High Speed tests and Heat Rise tests were uncovered in the same database and, according to the date printed on all those documents, printed in

January 2007. While Mr. Musnuff may not remember getting the Heat Rise tests at that time, Mr. Taylor's version of events makes more sense and is supported by the date printed on the Heat Rise tests.

Next, Mr. Musnuff's repeated position that he did not turn over the Heat Rise tests because he was told by individuals at Goodyear that they were not responsive cannot be taken seriously. The claim that the Heat Rise tests were merely to "provide information that a compounder could look at" is not reasonable. Goodyear performed the test for some purpose and Mr. Musnuff's own statements reflect this. For example, in his February 11, 2007 memo, Mr. Musnuff observed that a change in the compound of the G159 improved performance. (PSOF Ex. 12). Moreover, his June 5, 2008 email to Mr. Hancock stated Goodyear's "whole testing package" was to ensure the G159 was suitable for "over-the-road applications, including RV." (PSOF 31). And in an email dated May 8, 2009, Mr. Musnuff stated the Heat Rise tests were "taken during the *durability* testing of the G159." (PSOF Ex. 34) (emphasis added). Accordingly, prior to these sanctions proceedings, Mr. Musnuff knew the Heat Rise tests were part of Goodyear's testing used to determine the durability and suitability of the G159 for use on the road. His testimony to the contrary during the hearing cannot be believed.

Finally, Mr. Musnuff's claim that the Heat Rise tests were not even relevant to Plaintiffs' claim is frivolous. Mr. Musnuff knew Plaintiffs' theory and knew that Plaintiffs believed high temperatures caused tire separations. Mr. Musnuff also knew that Plaintiffs' expert had stated the temperatures at which tire degradation would occur and knew the

temperature Goodyear's own expert had testified about which would be cause for concern. Maintaining that the Heat Rise tests were irrelevant when they showed the temperature the G159 operated at when used at highway speeds is so obviously relevant that Mr. Musnuff's current position to the contrary is clear evidence he is operating in bad faith.

B. Mr. Hancock's Testimony

Mr. Hancock's testimony began with a discussion of his representation of Goodyear in the *Bogaert* case. (Doc. 1014 at 145). Mr. Hancock stated he had conversations with Mr. Musnuff regarding the requirements of Arizona Rule of Civil Procedure 26.1. (Doc. 1014 at 149). As the record now shows, Goodyear did not even attempt to locate testing data as part of its initial disclosure in *Bogaert*. Thus, either Mr. Hancock did not explain the requirements of Arizona Rule 26.1 to Mr. Musnuff and Goodyear or Mr. Musnuff and Goodyear chose to ignore that rule. Based on the entirety of the record, Mr. Hancock appears to have made no meaningful effort to ensure Goodyear was complying with the Rule.

Next, Mr. Hancock's testimony focused on his in-court statements in the present case. Mr. Hancock was adamant that at the time he made certain in-court statements, he had no prior exposure to the Heat Rise tests. At one point during cross-examination, Mr. Hancock stated: "I have never heard, before [Plaintiffs'] motion was filed in this case for sanctions, of a heat rise durability test." And at another point, "I never saw the heat rise test until it was ordered produced in this case after [Plaintiffs'] motion. I did not know the contents of the heat rise test at any time prior to its production here. I did not know it was called anything other than a heat rise test, and no one

mentioned it to me ever during any of the times referenced in the Court's order." (Doc. 1014 at 168).

On the topic of the High Speed tests which were eventually produced in response to Plaintiffs' Third Request, Mr. Hancock stated he learned of their existence "sometime prior to the third Request for Production," probably in "April or May of 2007." (Doc. 1014 at 158). Mr. Hancock admitted, however, that he was unclear on the exact date. (Doc. 1014 at 158). Mr. Hancock was asked why there had been a five month delay between when Mr. Musnuff said he first learned of the high speed tests in February 2007 and when they were produced in June 2007. The response was: "I don't know the answer to that, sir, because that would have been between Goodyear and Mr. Musnuff. I know that I received the documents with clearance to produce them on June 20, 2007." (Doc. 1014 at 159).

Mr. Hancock then recounted the series of events regarding the eventual production of the High Speed tests as follows. At the April 6, 2007 hearing, Mr. Hancock was "taken aback" by the Court's question regarding outstanding discovery because "nobody had been after [him] for any discovery." (Doc. 1014 at 164). When asked whether he knew about the High Speed tests at that time, Mr. Hancock responded "I haven't reviewed my records. I don't believe so but I don't know for certain. I apologize." Then, according to his testimony, sometime prior to May 17, 2007, he received Plaintiffs' Third Request. As of May 17, 2007, Mr. Hancock had sent the Third Request to Mr. Musnuff and Mr. Hancock "knew there was [high speed] testing." Mr. Hancock produced some of the high speed testing on June 6, 2007. (Doc. 1014 at 160). And produced the remaining tests on June 21, 2007. (Doc. 1014 at 159).

Finally, Mr. Hancock was asked regarding his behavior in connection with the deposition of Plaintiffs' expert Mr. Osborne. That deposition occurred on May 24, 2007. (Doc. 1014 at 164). At the time, Mr. Hancock knew Mr. Osborne "was under the impression that there was no high-speed testing at all." (Doc. 1014 at 166). When asked whether he told Plaintiffs prior to Mr. Osborne's deposition "that Goodyear had located those high-speed tests," Mr. Hancock admitted he did not. (Doc. 1014 at 167). Overall, Mr. Hancock was more credible than Mr. Musnuff but Mr. Hancock's testimony also established certain instances of inappropriate behavior.

It is now clear beyond dispute that Mr. Hancock knew in February 2007 that Goodyear had located the High Speed tests. Therefore, at the time of the April 6, 2007 hearing, Mr. Hancock had known about the high speed tests for two months and he had even acknowledged in an email to Mr. Musnuff that the tests should be produced. His statements at that hearing that Goodyear had "responded to all discovery" and Goodyear was "done or nearly done" were false.

Next, as of February 2007 Mr. Hancock knew Goodyear had the High Speed tests and, as acknowledged in his own email, those tests were important in response to Plaintiffs' expert's report. Long before that expert's deposition, Mr. Hancock knew Plaintiffs and the expert had been materially misled regarding the scope of Goodyear's testing. Despite this knowledge, Mr. Hancock proceeded with the deposition of Mr. Osborne and only produced the High Speed tests after the deposition was complete. At best, this behavior was aimed at prolonging the litigation. At worst, this behavior was meant to prevent Plaintiffs from obtaining information which

would help their case until it was too late for them to do anything with it.

And finally, Mr. Hancock's testimony that he had "never heard . . . of a heat rise durability test" before the present sanctions proceedings was false. As evidenced by the emails from *Bogaert*, Mr. Hancock was informed in 2008 that Goodyear had produced "heat-rise test data" in another G159 case. It is possible Mr. Hancock merely forgot about the *Bogaert* emails but, in the context of this case, it appears more likely that Mr. Hancock was not expecting Plaintiffs to gain access to the *Bogaert* emails and his testimony was an attempt to paint himself in a sympathetic light.

ANALYSIS

> What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting).

Mr. Hancock, Mr. Musnuff, and Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, Mr. Hancock, Mr. Musnuff, and Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court

in an attempt to hide their behavior. In the end, that plan succeeded in making this case far more complicated than necessary, requiring an absurd expenditure of resources by Plaintiffs and the Court.[21] Goodyear also succeeded in obtaining a settlement from Plaintiffs, a settlement Plaintiffs now believe was less than they would have been able to achieve had Mr. Hancock, Mr. Musnuff, and Goodyear complied with their discovery obligations.

The necessity for sanctions in these circumstances is obvious. But the form those sanctions should take presents a very difficult question. As set out below, the Ninth Circuit case law does not provide clear guidance for remedying a years-long course of misconduct such as that presented here. If the misconduct had come to light while the case was ongoing, entry of default judgment with a trial on damages would have been the obvious solution. *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming striking of answer and entry of default judgment because of discovery misconduct). But this case is closed and the issue is the permissible scope of sanctions in this context. The Ninth Circuit seems to allow an award of sanctions only in the amount of harm directly caused by the sanctionable conduct. In the present circumstances, it would be impossible to draw the precise causal

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[21] Prior to these sanctions proceedings, the parties filed approximately 163 motions, the Court issued 254 orders, and the case had close to 1,000 docket entries. By way of comparison, a patent case filed around the same time, and which included a twelve-day jury trial, ended with approximately 700 docket entries. *Dupont Air Products Nanomaterials, LLC v. Cabot Microelectronics Corp.*, CV-06-2952. And an incredibly complex ERISA class action, filed a year earlier than the present case, ended this year with just over 750 docket entries. Allen v. Honeywell, CV-04-424.

connections between the misconduct and the fees Plaintiffs incurred. Neither the Court nor the Plaintiffs could separate the fees incurred due to legitimate activity from the fees and costs incurred due to Goodyear's refusal to abide by clear and simple discovery obligations. For example, if Goodyear had responded to Plaintiffs' First Request with all responsive documents, Goodyear might have decided to settle the case immediately.[22] In these circumstances, one could conclude practically all of Plaintiffs' fees and costs were due to misconduct (*i.e.*, the case would have been resolved in an easy and straightforward manner absent Goodyear's obstructionism). Alternatively, one could conclude practically none of Plaintiffs' fees and costs were due to misconduct (*i.e.*, even if Goodyear had disclosed every responsive document in its possession, Goodyear could have refused to settle and prolonged the litigation through other tactics).

While there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith, based on Goodyear's pattern and practice in G159 cases, the case more likely than not would have settled much earlier. In these circumstances, the most appropriate sanction is to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request.[23] That was the

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[22] Of course, the evidence might have made Plaintiffs realize they had a winning trial and they would have refused to settle.

[23] The Court recognizes that Plaintiffs might have a contingency agreement with their counsel. The amount of sanctions will be calculated pursuant to the lodestar method and will not be limited to the amount paid by Plaintiffs as a percentage of the settlement. *Cf. Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court may not rely on a

first definitive proof that Goodyear was not going to cooperate in the litigation process. Instead, Goodyear believed discovery would consist of a "game of hide and seek." *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 790 (9th Cir. 2011); *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 579 (9th Cir. 1992) (faulting party for "treating discovery as a game instead of a serious matter); *United States v. $42,500*, 283 F.3d 977, 983 (9th Cir. 2002) ("A court is not a place to play hide-and-go-seek with relevant evidence and information ."). Goodyear and its counsel must now pay the price for adopting this approach.

As permitted by Arizona law, Plaintiffs may wish to affirm their settlement agreement and pursue an independent cause of action for fraud based on Mr. Hancock, Mr. Musnuff, and Goodyear's behavior. But the present case has long been closed and it would be inappropriate to allow Plaintiffs to litigate their fraud claims here. *Cf. Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (allowing judgment to be set aside only upon showing of "grave miscarriage of justice").

I. Standard for Awarding Sanctions

Given that this case was closed pursuant to the parties' agreement, there are two possible bases for imposition of sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear: 28 U.S.C. § 1927 and the Court's inherent power.[24] As set out below, sanctions are appropriate under both.

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contingency agreement to increase or decrease what it determines to be a reasonable attorney's fee.").

[24] Sanctions pursuant to Federal Rule of Civil Procedure 11 should be imposed before the case is closed. *See* Moore's Federal

A. 28 U.S.C. § 1927 Cannot Reach Goodyear's Conduct

Pursuant to 28 U.S.C. § 1927: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this statute, an attorney's conduct is sanctionable only if it multiplies the proceedings in both an "unreasonable and vexatious manner." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002). In addition, an attorney must have acted in bad faith or engaged in conduct tantamount to bad faith. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The imposition of sanctions under § 1927 requires a finding of bad faith."). But this statute allows for sanctions only against "an attorney or otherwise admitted representative of a party." *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986). Therefore, any sanctionable conduct by Goodyear itself is beyond the reach of § 1927.

B. Court's Inherent Power Reaches Goodyear and Counsel

"Under its inherent powers, a district court may . . . award sanctions in the form of attorneys' fees against a party or counsel who acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (emphasis added). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44

Practice § 11.22(2)(a) ("[T]he court should ordinarily impose [Rule 11] sanctions before issuing a final order.").

(1991). Thus, as with sanctions under Section 1927, before awarding sanctions under its inherent power, the Court "must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." *Id.*

C. Definition of Bad Faith

A comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible, but the type of conduct at issue "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). Such conduct includes "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991). And "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F.3d at 994. Therefore, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. *Id; see also B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002) (same); *Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith). It is of particular importance to note that it is "permissible to infer bad faith from [a party's] action[s] plus the surrounding circumstances." *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011). Accordingly, Mr. Hancock, Mr. Musnuff, and Goodyear are incorrect when they repeatedly claim the Court

must, in effect, obtain a confession before imposing sanctions.

II. Type of Sanctions

Sanctionable conduct may result in both monetary and non-monetary relief.

A. Sanctions Under § 1927

Sanctions pursuant to § 1927 are limited to an amount equal to the additional expenditures incurred "as a result of the multiplicity of the proceedings." *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Any amount awarded pursuant to § 1927 must have been directly caused by the sanctionable conduct. *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983) ("Section 1927 only authorizes the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct; it does not authorize imposition of sanctions in excess of costs reasonably incurred because of such conduct."). But this rule is softened by the recognition that it is often "impossible to determine with mathematical precision the fees and costs generated only by" the sanctionable conduct. *Lahiri v. Universal Music and Video Distribution Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010). District courts are permitted to exercise their discretion and make reasonable adjustments when attempting to determine the appropriate size of sanctions. *Id.* (affirming "reasoned exercise of discretion" regarding amount of fees awarded pursuant to § 1927).

B. Monetary Sanctions Under Court's Inherent Power

The Ninth Circuit recently ruled that compensatory sanctions under a Court's inherent power must be

limited to the amount necessary to compensate the opposing party for the harm caused by the misconduct. *Miller*, 661 F.3d at 1029. In so ruling, the Ninth Circuit concluded a district court erred by awarding all of the attorneys' fees and costs to a plaintiff when the court did not make an explicit finding that the defendant's conduct caused plaintiff to incur all of those fees. *Id.* This holding seems to be in direct conflict with Supreme Court authority.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the district court had relied on its inherent power and sanctioned NASCO a sum equal to "the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. At the Supreme Court, Chambers challenged this amount by arguing "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong." *Id.* at 57. The Supreme Court rejected this argument, finding "the frequency and severity of Chambers' abuses of the judicial system" meant "[i]t was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* at 57. This is a rejection of the position that only monetary harms incurred as a direct result of sanctionable conduct can be remedied.

It is difficult to reconcile *Chambers* with the Ninth Circuit's recent *Miller* decision. *See Miller*, 661 F.3d at 1039 (Ikuta, J., dissenting) (noting *Chambers* is contrary to holding in *Miller*). In an attempt to do so, the Court concludes monetary sanctions under the Court's inherent power *usually* must be premised on a specific factual finding of a direct causal link between the sanctionable conduct and the alleged harm. Only when the sanctionable conduct rises to a truly egregious level can all of the attorneys' fees incurred

in the case be awarded. *Chambers*, 501 U.S. at 57. In less egregious cases, a court must tailor its award more carefully. *See, e.g., Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1111 (9th Cir. 2005) (affirming award of sanctions "designed to compensate [plaintiff] for unnecessary costs and attorney's fees"). Of course, there is no requirement that a court limit its sanctions award to the amount of attorneys' fees and costs because sanctions can be awarded for other types of harm incurred as a result of the sanctionable conduct. For example, sanctions can compensate a party for the "pain and suffering" caused by the sanctionable conduct. *See B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1109 (9th Cir. 2002) (affirming award of "compensatory damages" sanctions pursuant to court's inherent power due to "the embarrassment and pain suffered by Plaintiff" as a result of the sanctionable conduct).

Finally, under its inherent power the Court may award non-compensatory monetary sanctions "to vindicate the court's authority and deter future misconduct." *Miller*, 661 F.3d at 1030. But large non-compensatory monetary sanctions "are akin to criminal contempt and may be imposed only by following the procedures applicable to criminal cases, including appointment of an independent prosecutor, proof beyond a reasonable doubt and a jury trial." *Id.*

C. Non-Monetary Sanctions

In addition to monetary sanctions, courts imposing sanctions under their inherent power have a wide variety of other sanctions at their disposal. Courts have the inherent power to: vacate judgments, order dismissal of a suit, strike an answer and enter default judgment. *Chambers*, 501 U.S. at 45; *Thompson v. Housing Authority of City of* Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986) (inherent power includes

power to "impose sanctions including, where appropriate, default or dismissal"); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (dismissal pursuant to inherent powers); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming order striking answer and entering default judgment). But these type of sanctions are usually employed to vacate a fraudulently obtained judgment or where the litigation is ongoing. These sanctions are not a good fit for situations, such as the present one, where Plaintiffs have released their underlying claims and they do not wish to rescind that agreement. Because of that release, there are no pending claims which the Court could, for example, enter default judgment on.

III. Sanctionable Behavior

The troubling behavior by Goodyear and its counsel began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal. Without recounting the entire factual history already outlined, the following are the most egregious instances where Mr. Hancock, Mr. Musnuff, and Goodyear engaged in sanctionable behavior.

A. First Request for Production of Documents

One of the core arguments presented by Mr. Musnuff and Goodyear is that they had no further obligation to respond to Plaintiffs' First Request after they sent their objections and a small subset of responsive documents. This position is necessitated by the fact that there can be no serious dispute that the Heat Rise tests, the extended DOT tests, the crown durability test, and the bead durability test were all responsive to the First Request. Mr. Musnuff and Goodyear have no choice but to claim the response

to the First Request was appropriate. Mr. Musnuff and Goodyear also have to maintain that the First Request was withdrawn by Mr. Kurtz. Their arguments are not convincing and, in fact, it is now clear they did not adopt this position until they were faced with sanctions.

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs served their First Request shortly after the case began. (Doc. 59). That request sought "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." When responding to this request, Goodyear had two options. First, Goodyear could serve an objection to the request as a whole. Fed. R. Civ. P. 34(b)(2)(B). Second, Goodyear could serve an "objection to part of [the] request" *provided* it specified the part it was objecting to and it responded to the non-objectionable portions. Fed. R. Civ. P. 34(b)(2)(C). What Goodyear could not do, but what it did, was combine its objections with a partial response, without any indication that the response was, in fact, partial.[25] Goodyear apparently believes that its response to the First Request was sufficient to signal to Plaintiffs that other potentially responsive material was not being produced. This position finds absolutely no support in the Federal Rules, federal case law, or common sense.

The language of Rule 34 is clear. The rule states: "An objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). As clarified in the 1993 Advisory Committee notes, this language is meant to "make

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[25] It is especially troubling that Goodyear claimed its secretly partial response was being made "in a good faith spirit of cooperation."

clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions." The natural corollary of this is that any objection must identify the particular portion which is not being responded to on the basis of the objection. As stated in Moore's Federal Practice, "If the party objects to the production of an item or category in part rather than in its entirety, *the objection must specify the part to which the objection pertains.*" Moore's Federal Practice § 34.13(2)(b) (emphasis added). And in Federal Practice and Procedure: "The responding party may object to some or all of the discovery sought. In this case it must state, with respect to each item or category to which objection is made, the reason for the objections. *One who objects to part of an item or category should specify to which the objection is directed.*" Federal Practice and Procedure § 2213 (emphasis added). The plain language of Rule 34 requires a partial response be identified as such.

This plain language analysis is supported by case law. For example, in *Rodriguez v. Simmons*, 2011 WL 1322003, at *7 (E.D. Cal.), the plaintiff had served a Rule 34 request for medical records. The defendants served objections and indicated they had already produced some responsive documents. The court observed this response was inadequate. In the court's view, the defendants had to "clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld" based on an objection. *Id.* It was especially critical if the documents existed but were being withheld that plaintiff "be made aware of this fact." *Id.* at *7 n.9. This would allow the parties to confer and attempt to resolve whether the unproduced documents should be produced prior to any court involvement.

Similarly, in *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, 2011 WL 939226, at *9 (D. Kan.), a defendant had produced documents "subject to" certain objections. The plaintiff believed this response was inappropriate because it was left "wondering whether all documents [had] been produced, or if some documents [were] still being withheld." *Id.* at *8. The court agreed the response was insufficient. The court observed the defendant could "object to part of a document request," but production "subject to" general objections was not permitted because such objections failed "to specify exactly what part of the document requests [was] being objected to." The failure to comply with Rule 34 left the plaintiff "guessing as to whether Defendant has produced all documents, or only produced some documents and withheld others." *See also GMAC Real Estate, LLC v. Joseph Carl Sec., Inc.*, 2010 WL 432318, at *1 (D. Ariz.) ("Objections must be in writing and identify the particular portions of the request subject to the objection; all other portions should be made available for inspection.").

Plain common sense also supports this reading of Rule 34. Were Goodyear correct that Rule 34 allows litigants to make undisclosed partial document productions, discovery would break down in practically every case. A litigant with any viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial and the opposing party would have no way of knowing the production was partial. Absent an indication of what, exactly, the responding party was objecting to, courts would have no way of assessing the propriety of the objections. Instead, courts would be flooded with motions to compel by

litigants seeking to confirm that undisclosed responsive documents did not exist. And courts would then be forced to ask counsel, over and over again, "Do other documents exist?"

Accordingly, the plain language of Rule 34, case law, and common sense show Goodyear's response to the First Request was not complete or accurate. But Goodyear has other problems regarding the First Request in that the facts show its limited response was not made in good faith and Mr. Hancock, Mr. Musnuff, and Goodyear knew the responses were inadequate.

As is now clear, the Heat Rise tests, extended DOT tests, crown durability test, and bead durability test were performed on the exact tire at issue, were *directly* relevant to Plaintiffs' defect theory, and were performed around the *same time* other tests, which were produced, were performed. Goodyear claims that its boilerplate objections in response to the First Request were appropriate, but it is clear no one made even a casual attempt to determine what responsive documents existed. There has been no acceptable explanation for Goodyear's belief that these tests were irrelevant or why Goodyear claimed that locating these tests would have been unduly burdensome. Thus, despite knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith.

The record also establishes that Mr. Hancock and Mr. Musnuff knew Mr. Kurtz had not withdrawn his First Request. In fact, there is indisputable evidence that Mr. Hancock and Mr. Musnuff knew the First Request remained outstanding and supplementation

was needed. Mr. Hancock and Mr. Musnuff's failure to produce the High Speed tests in a timely manner was a tactical decision made in bad faith in an attempt to prolong this litigation and multiply the proceedings. Mr. Hancock and Mr. Musnuff's decision not to produce the other tests, allegedly learned of in the context of other cases, was a bad faith attempt to hide responsive documents. Goodyear is equally responsible for this behavior because despite giving documents to Mr. Musnuff, Ms. Okey retained final approval authority on discovery responses. Therefore, Ms. Okey knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior.

B. Third Request for Production of Documents

The response by Goodyear and its counsel to the Third Request is further proof of bad faith conduct. Plaintiffs' Third Request sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). In response to this request, Mr. Hancock, Mr. Musnuff, and Goodyear eventually produced the High Speed tests. Waiting until a response to the Third Request was due was a bad faith attempt by Mr. Hancock, Mr. Musnuff, and Goodyear to prolong the litigation and make Plaintiffs incur additional costs. In particular, Mr. Hancock and Mr. Musnuff engaged in bad faith behavior by proceeding with Plaintiffs' expert's deposition before disclosing the High Speed tests.

In addition, Mr. Musnuff and Goodyear engaged in a bad faith attempt to conceal documents when they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request. Mr. Musnuff and Goodyear had previously taken the

position in other litigation that these tests were responsive to an almost identical discovery request. That is, the Heat Rise tests and other concealed tests were used by Goodyear to determine the G159's suitability for use on the highway. In fact, there is correspondence reflecting Mr. Musnuff and Goodyear employees knew the Heat Rise tests and other tests were responsive to the Third Request. (PSOF Ex. 24). There is no acceptable justification for the failure to provide all responsive documents to the Third Request.

Finally, even accepting Mr. Hancock did not learn about the Heat Rise tests and other tests until the June 5, 2008 email in *Bogaert*, Mr. Hancock's failure to immediately correct his statements and the disclosures in the present case were motivated by a bad faith desire to keep the tests concealed.

C. Goodyear's 30(b)(6) Witness

In September 2007, Plaintiffs deposed Richard Olsen as Goodyear's 30(b)(6) witness. Prior to this deposition, the Court confirmed with Goodyear's counsel that Mr. Olsen would be speaking on behalf of Goodyear. (Doc. 243 at 29). During his deposition, Mr. Olsen was asked if there was "any separate testing" besides the tests Goodyear had produced. Mr. Olsen responded there were a "number of different test procedures" run during the development process but no documentation of those other tests was available. That was false.

The record is clear that Mr. Olsen knew about the Heat Rise tests as well as the crown durability test, bead durability test, and DOT endurance tests at the time of his deposition. The record is also clear that those tests still existed. Mr. Olsen made clear false

representations when he stated otherwise. Because he was speaking on behalf of Goodyear, that means Goodyear made false representations. Fed. R. Civ. P. 30(b)(6) (corporation must designate person "to testify on its behalf"). Mr. Olsen had an obligation to "review all corporate documentation" that was relevant to the deposition topics and it appears he did so as the summary in his files contains references to all the concealed tests. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001). His deposition testimony, therefore, can only be explained as consistent misrepresentations about the available testing. This easily qualifies as conduct tantamount to bad faith.[26]

D. Misleading In-Court Statements

Plaintiffs first requested Goodyear's testing data in September 2006. Goodyear, through its counsel, decided not to comply with its obligation to produce some of that testing data until June 2007. And it decided to withhold completely a wide variety of testing data. Therefore, any statement prior to June 2007 that Goodyear had produced all requested documents was false. On April 6, 2007, the Court asked whether Goodyear had "any internal documentation" that had been requested but not produced. Mr. Hancock

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[26] The Court recognizes that testimony by a 30(b)(6) witness may not absolutely bind "a corporate party to its designee's recollection." *See A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (finding 30(b)(6) testimony does not act as binding judicial admission). But Goodyear has not claimed Mr. Olsen simply made a mistake or was not aware of the other tests. Moreover, excusing this type of behavior based on its witness's faulty recollection would reward Goodyear for not adequately preparing that witness to discuss the very material topics identified in the deposition notice.

responded that it had produced all the requested documents. (Doc. 146 at 13). That was false. On May 17, 2007, the Court asked Goodyear "are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?"[27] Mr. Hancock responded that there were, but they had only been requested "last week." That was false.[28] Mr. Hancock also stated the tests would be produced in mid-June. Given the apparent plan to never produce the Heat Rise tests, this statement was misleading at best.

After Goodyear produced the High Speed tests, it continued to make untruthful statements to the Court. For example, on September 10, 2007, Mr. Hancock stated Goodyear had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). That was false. At a hearing on October 19, 2007, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). That was false. At that same hearing, Mr. Hancock also stated there were "no documents for [its 30(b)(6) witness] to be questioned about other than the documents that have been produced." That was false. And finally, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing on this tire. The original discovery request [was for] all documents which relate to any speed testing to determine that the tire was suitable for

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[27] The Heat Rise tests were conducted at 35 mph, meaning they were directly implicated by the Court's question.

[28] The tests had been requested in September 2006.

highway purposes. All of that has been produced." That was false.

Mr. Hancock now claims that he did not know these statements were false at the time they were made. For some of them, he is correct. But it should go without saying that *someone* must be responsible when an attorney makes these type of repeated false statements in Court. Mr. Hancock, Mr. Musnuff, and Goodyear seem to believe sanctions are inappropriate if there is a claim, however implausible, that the false statements can be attributed to communication breakdowns. That cannot be the case. The question is, who should be responsible?

It appears Mr. Hancock did not know of the Heat Rise tests, extended DOT test, bead durability test, and crown durability test until June 2008 when he learned of them in the context of the *Bogaert* case.[29] (PSOF Ex. 31). Therefore, the Court is sympathetic to his position that he should not be held responsible for certain statements he made after Mr. Musnuff and Goodyear knew about those tests and had made the decision not to disclose them. The problem is that Mr. Hancock did not correct the record when he subsequently learned these other tests existed. The *Haeger* case continued for approximately twenty-two months after he learned of these other tests. Accordingly, while his culpability is reduced, it is not purged.

As for Mr. Musnuff, he claims he was unaware of the in-court representations Mr. Hancock was making. That is not true. Mr. Hancock averred he "discussed any and all court appearances and discovery disputes

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[29] Mr. Hancock knew of the High Speed tests long before they were produced.

with [Mr. Musnuff] both before and after such events." (Doc. 980-2 at 3). The Court finds this portion of Mr. Hancock's credible. Based on accepting that testimony, Mr. Musnuff was informed that Mr. Hancock was repeatedly representing in court that no further documents existed. Mr. Musnuff knew that other documents existed but he never corrected Mr. Hancock. That failure was a bad faith attempt to suppress the documents.

And as for Goodyear, its outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests. Allowing Goodyear to escape the consequences of the statements made by its "freely selected agent[s] . . . would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent[s] and considered to have notice of all facts." *Link v. Wabash* R.R., 370 U.S. 626, 633-34 (1962). Ms. Okey remained responsible for discovery responses and, ultimately, she remained responsible to keep informed regarding the conduct of this litigation and the representations Mr. Hancock was making in court.

IV. Amount and Apportionment of Sanctions

Plaintiffs will be directed to file documentation establishing the amount of attorneys' fees and costs incurred after Goodyear served its supplemental responses to Plaintiffs' First Request. Based on his relatively limited involvement, but in light of his repeated misstatements and his failure to correct the record once he learned his representations were false, Mr. Hancock will be held responsible for twenty percent of those fees and costs. Mr. Musnuff and Goodyear will be held jointly responsible for eighty

percent of the fees. The Court makes this allocation decision based on its belief that Mr. Hancock is less culpable but Mr. Musnuff and Goodyear are equally culpable.

This allocation decision is, of necessity, somewhat imprecise. Goodyear and its attorneys adopted a strategy, implemented in this case to great effect, to resist all legitimate discovery, withhold *obviously* responsive documents, allow Plaintiffs and their experts to operate under erroneous facts, disclose small subsets of documents as late as possible, and otherwise attempt to turn this case based on a motor vehicle accident into an Arizona version of *Jarnydce and Jarndyce. Cf. United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009) (citing Charles Dickens, Bleak House 3 (1853)). As observed earlier, it would be impossible to point to precise causal links between all the sanctionable behavior and the expenses incurred by Plaintiffs. In a case of repeated egregious conduct such as the present, the Court must be free to fashion an appropriate remedy. The Court has done so.

Goodyear will also be required to file a copy of this Order in any G159 case initiated after the date of this Order.[30] Based on Goodyear's history of engaging in serious discovery misconduct in every G159 case brought to this Court's attention, filing this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in the past, not operated in good faith when litigating such cases. It will also serve as notice of the existence of certain tests Goodyear attempted to conceal in previous cases.

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[30] Goodyear may apply to the court hearing the case to be excused from this requirement.

V. Spartan's Request for Sanctions

The final issue is whether to award sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear in favor of Spartan. Over the years, Spartan was involved as a codefendant in numerous G159 cases. Spartan believes the G159 test data recently revealed by Goodyear establishes "the tire would be indefensible in any action." (Doc. 1071 at 3). In particular, Spartan points to Goodyear representations that the G159 was appropriate for motor home use despite Goodyear's knowledge that the G159 operated at too high of temperature in that setting. (Doc. 1048 at 5). Based on Goodyear's misrepresentations, Spartan seeks to recover *all* the attorneys' fees and expenses it incurred as a result of G159 litigation it was involved in with Goodyear. It would be inappropriate to sanction Mr. Hancock, Mr. Musnuff, and Goodyear for actions taken in other cases. Therefore, the only issue is whether Spartan should recover any expenses incurred in the present case.

Spartan did not serve any discovery in this case. Spartan did receive copies of the discovery papers provided by Plaintiffs and Goodyear, but Spartan has not pointed to *specific* evidence establishing when and how it relied on those discovery papers in formulating its actions in this case. Absent some evidence of a causal connection between misconduct and Spartan's defense, Spartan is not entitled to an award of fees in this case. Spartan likely would have a viable case of fraud against Goodyear based on Goodyear's misrepresentations, but that claim should be litigated in as separate action where Spartan can introduce evidence regarding all the G159 litigation it was involved in over the years.

Accordingly,

IT IS ORDERED the Motion for Sanctions (Doc. 938) is GRANTED IN PART.

IT IS FURTHER ORDERED the Motion for Hearing (Doc. 1034) is DENIED.

IT IS FURTHER ORDERED no later than December 14, 2012 Plaintiffs shall file their application for attorneys' fees as required by Local Rule.

DATED this 8th day of November, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 08/26/13]

No. CV-05-02046-PHX-ROS

LEROY HAEGER, et al.,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER CO., et al.,

Defendants.

ORDER

On June 26, 2013, the Court gave the parties one last opportunity to reach agreement regarding the amount of attorneys' fees to be awarded based on misconduct by Graeme Hancock, Basil Musnuff, and Goodyear Tire and Rubber Co. ("Goodyear"). The parties could not reach agreement and they profoundly object to referring the issue to a special master. Rather than prolong this case any further, the Court now resolves the appropriate amount of attorneys' fees and costs.

I. Reasonable Attorneys' Fees and Costs

In its June 26, 2013 Order, the Court explained that it would use the lodestar method to calculate the appropriate amount of fees. That method contemplates multiplying the "reasonable hourly rate" by the number of hours "reasonably expended." *Morales v.*

City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1996). The prior order determined the appropriate hourly rates. Now the Court must determine the reasonable number of hours. The parties present vastly different views on this issue.

To begin, the Supreme Court has made clear that determining the appropriate amount of attorneys' fees "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Supreme Court recently stressed that, when determining the size of a fee award, "trial courts need not, and indeed should not, become green-eyeshade accountants." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011). A court should not strive to "achieve auditing perfection" but should attempt "to do rough justice." *Id.* And in doing so, a court may "take into account [its] overall sense of a suit" and may even "use estimates in calculating and allocating an attorney's time." *Id.*

Despite this Supreme Court authority, the Ninth Circuit has repeatedly chided district courts for not providing an adequate explanation of their decisions regarding attorneys' fees. For example, the Ninth Circuit recently claimed that it would only be "a small matter" for district courts "to abide by the injunction of the arithmetic teacher: Show your work!" *Padgett v. Loventhal*, 706 F.3d 1205, 1208 (9th Cir. 2013) (quotation omitted). Therefore, the Court will attempt to make as clear as possible how it calculated the appropriate award. It is worth keeping in mind, however, that when the attorneys' fees at issue run into the thousands of hours and millions of dollars, it is exceptionally difficult to assess each and every billing entry with absolute clarity and consistency. *Cf. Salstrom v. Citicorp Credit Services, Inc.*, 74 F.3d 183, 185 (9th Cir. 1996) ("[I]t would be impossible to

determine with mathematical precision the amount of attorney's fees and costs incurred by Citicorp as a direct result of Gudger and Webb's misconduct.").

A. General Objections

Goodyear and its attorneys propose a system of nine different codes for the Court to use when evaluating the approximately 240 pages of time entries. (Doc. 1100). Almost every time entry is accompanied by some combination of the nine codes. Unfortunately, even a cursory review raises concerns about the good faith nature of the objections. For example, Goodyear and its attorneys have objected to many entries that Plaintiffs are not seeking compensation for.[1] Those objections are obviously inappropriate. In addition, the objections are wildly inconsistent, making it exceptionally difficult to evaluate the billing records as a whole.[2] In light of the nonsensical objections to unbilled time, and the seemingly random nature of a great many other objections, it is hard to conclude Goodyear and its attorneys carefully reviewed the records.

Much more important than these errors, however, is that the coded objections present a very misleading view of possible adjustments. Goodyear and its attorneys present totals under each of the nine different codes. But sustaining a global objection to any code

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[1] Goodyear and its attorneys have made over forty objections to time entries that Plaintiffs' counsel are not seeking to recover. *See, e.g.*, Doc. 1100-2 at 45.

[2] Looking at two entries close in time, Goodyear and its attorneys object that the entry dated 2/1/07 stating "telephone conference with client" is too "vague and/or incomplete." But there is no objection to the 2/22/07 entry stating, in its entirety, "review list of cases."

would result in a grossly excessive deduction. For example, Goodyear and its attorneys claim that sustaining their Code H objections ("excessive billings/ fees") should result in a reduction of $375,772.50. (Doc. 1100-3 at 2). But this amount is derived by assuming the Court will disallow, in its entirety, any entry allegedly containing "excessive time." So the time entry on 5/18/07 reflecting twelve hours for attending an expert deposition would be reduced to zero, even though there can be no question that *some* time on that date was appropriately billed. Thus, the code system presents the situation as one where the Court could merely pick the meritorious codes and then subtract the total allegedly attributable to each code. That is not, in fact, the case.

The code system and accompanying totals are also misleading because they do not take into account that the codes often overlap. Therefore, if the Court were to sustain the objections based only on three of the nine codes, that would result in a larger deduction than the entire amount Plaintiffs seek.[3] Obviously the Court cannot engage in such a simplistic analysis.[4]

Based on Goodyear and its attorneys' objections, the reductions set forth below are far less than what one might expect. But the Court has spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award. Relying primarily on its own experience

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[3] Sustaining the objections on Code B ($1,611,044), Code C ($603,356), and Code F ($722,406.52) would result in total deductions of $2,936,806.52.

[4] Goodyear and its attorneys recognize this flaw but do not offer an alternative method of calculation. (Doc. 1102 at 4 n.2).

in this case, the Court makes the rulings and adjustments set forth below.

B. Nine Code System

i. Code A Objections

Code A refers to "recreated time entries for the period from August 11, 2009 through December 31, 2010." (Doc. 1100 at 2). During that time period, Plaintiffs' counsel did not maintain contemporaneous time records. While the lack of contemporaneous time records is often a problem, this case is unique.

Here, the Court is attempting to award reasonable attorneys' fees in a case where Plaintiffs never planned to seek an award of attorneys' fees. This is a contingency-based case and contingency fee attorneys often do not keep contemporaneous time records because they will never seek a fee award from the court. Thus, Goodyear and its attorneys seem to be arguing the Court should heavily discount or deny the fees described in Plaintiffs' recreated time entries because Plaintiffs failed to predict that, due to widespread discovery misconduct, they would eventually need to apply for fees. In these circumstances, disallowing fees based on the lack of contemporaneous time records is not appropriate.

The recreation of time entries does, however, raise the prospect of overstating the time involved. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 438 n.13 (1983) (allowing 30% reduction based on lack of contemporaneous time records). Therefore, out of an abundance of caution, the Court will impose a twenty percent reduction to those time entries reflecting Code A objections.

ii. Code B Objections

Code B refers to "block-billing." Goodyear and its attorneys claim Plaintiffs' counsel engaged in inappropriate block-billing throughout this case. But, as pointed out by Plaintiffs, it is not block-billing per se that is objectionable. Rather, the problem with block-billing is that there is often insufficient detail for the Court to determine whether the amount expended in each block was reasonable. The records here do not suffer from that flaw. Except as indicated in the context of other objections, the entries identified as block-billed contain sufficient information for the Court to assess the reasonableness of the time spent on the tasks performed. *See Campbell v. Nat'l Passenger R.R. Corp.*, 718 F. Supp. 2d 1093, 1103 (N.D. Cal. 2010) (block billing was "detailed enough for the Court to assess the reasonableness of the hours billed").[5] Therefore, the Code B objections are overruled.

iii. Code C Objections

Code C refers to "vague and/or incomplete descriptions of the services performed." (Doc. 1100 at 2). The Court concludes that some of the Code C objections are well-taken and adjustments must be made. The vast majority of these adjustments reflect telephone calls, conferences, or emails with no indication regarding the topic of those communications. The Court cannot conclude the time was reasonably expended absent

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[5] Also, in light of the Court making other objections to many of the block-billed entries, any across the board block-billing reduction would result in excessive reductions. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 842, 948 (9th Cir. 2007) (reversing across-the-board reduction for block-billing because it resulted in excessive reduction).

such information. Therefore, the Court makes the adjustments set forth on Appendix A. Unless listed on Appendix A, the Code C objections are overruled.

iv. Code D Objections

Code D refers to "non-taxable costs pursuant to 28 U.S.C. § 1920." (Doc. 1100 at 2). As set forth in the Court's June 26, 2013 Order, the Court will not limit the award to taxable costs. Therefore, with the exception of $4,880.73, the costs for which Plaintiffs did not submit supporting documents, the objections under Code D are overruled.

v. Code E Objections

Code E refers to "multiple timekeepers performing the same tasks/duplicative fees." (Doc. 1100 at 2). Having reviewed the relevant entries, Goodyear and its attorneys have not provided a meaningful way for the Court to assess the accuracy of their contention that the entries are duplicative. In fact, Goodyear and its attorneys seem to believe that almost any time more than one attorney billed for a particular issue, only one attorney should be compensated. Given that Goodyear had over ten attorneys working on this case, the amount of discovery involved, and the complicated nature of the issues, the claim that Plaintiffs should be limited to the time one attorney spent on any given issue not convincing. *See Democratic Party of Wash. State Reed*, 388 F.3d 1281, 1286-87 (9th Cir. 2004) ("Courts must exercise judgment and discretion, considering the circumstances of the individual case, to decide whether there was unnecessary duplication."). The Court overrules the objections based on Code E.

vi. Code F Objections

Code F refers to "entries unrelated to the alleged harm and outside the scope of the Court's Order." (Doc. 1100 at 2). This objection takes issue with the Court's decision to award all the fees and costs incurred after it became clear that Goodyear and its attorneys were not behaving in good faith. The Court previously explained that, in these unique circumstances, it is inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct; proving that linkage is an almost impossible task given how the misconduct permeated the entirety of this case.[6] Thus, the Code F objections are overruled.

As explained in the June 26, 2013 Order, the Court will make a contingent award in the event a direct linkage between the misconduct and harm is required. For purposes of the contingent award, the Code F objections will be sustained. Goodyear and its attorneys have submitted a calculation that the Code F objections total $722,406.52. (Doc. 1100-3 at 2). Therefore, the contingent award will reflect the other appropriate deductions, as well as this deduction.[7]

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[6] Some of the Code F objections are clear evidence that Goodyear and its attorneys have not conducted a thoughtful review of their objections. For example, the time Plaintiffs' counsel spent in preparing the reply in support of their motion for sanctions is obviously directly linked to the misconduct. But Goodyear and its attorneys assert a Code F objection to some of that time. *See, e.g.*, time entries dated 10/11/2011 and 10/12/2011.

[7] As noted in footnote 5, many entries are subject to multiple objections. Therefore, sustaining more than one objection to a single entry will result in double counting that entry. For example, the entry on 11/08/06 contains an objection under Code C and Code F. The objection based on Code C was sustained, meaning sustaining the objection also on Code F will result in deducting that $33.00 twice. But there is no simple way to avoid

vii. Code G Objections

Code G refers to "administrative and/or clerical tasks." (Doc. 1100 at 2). The overwhelming number of Code G objections are aimed at tasks performed by a paralegal and billed at the paralegal's hourly rate.[8] Goodyear and its attorneys apparently believe these entries were for the performance of "clerical" work, *i.e.* work that not even a paralegal should be allowed to bill for. (Doc. 1103 at 13, work should have been designated as unrecoverable "overhead."). Some of the entries do involve work of a clerical nature. *See Schrum v. Burlington N. Santa Fe Ry. Co.*, 2008 WL 2278137, at *12 (D. Ariz. May 30, 2008) (noting "work that is clerical in nature should be subsumed in a law firm's overhead"). Many of the time entries to which there is a Code G objection contain a mix of compensable and noncompensable activities. Therefore, the Court has determined the appropriate amount for the compensable activities while subtracting the noncompensable amounts. *See id.* (clerical tasks include "calendaring activities, scheduling depositions and bates labeling documents"). The appropriate adjustments are set forth on Appendix B. If not referenced, the Code G objections are overruled.

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this problem and the amount of double counting is minimal in relation to the size of the total award. Therefore, the contingent award will reflect the other appropriate deductions as well as the full $722,406.52 deduction.

[8] Goodyear and its attorneys do not object to all of the billing entries by paralegals, effectively conceding that some paralegal work is recoverable. *See Trustees of Const. Industry and Laborers Health and Welfare Trust v. Redland Insurance Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006) ("[F]ees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is the prevailing practice in a given community.").

viii. Code H Objections

Code H refers to "excessive billings/fees." Plaintiffs are only entitled to the amount of time "reasonably expended." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). Goodyear and its attorneys believe the absolute maximum the Court could find reasonable in this case is approximately 800 hours by Mr. Kurtz and his paralegal, a little over 500 hours from all the staff at Jennings, Strouss & Salmon, and no hours from Mr. Abernethy. (Doc. 1100-4). Thus, Goodyear and its attorneys believe this case should not have required more than 1,300 hours of work. Given the history of this case, that figure cannot be taken seriously.[9]

As outlined in the sanctions order, very early in this case Goodyear and its attorneys decided to resist all discovery and fight Plaintiffs on seemingly every issue. At the time of the sanctions order, the case had involved approximately 163 motions, 254 Court orders, and close to 1,000 docket entries. (Doc. 1073 at 50 n.21). That is *substantially* more activity than the vast majority of cases, including even more complex cases that proceed through trial. And while docket activity can be a useful proxy for determining the amount of attorney time devoted to a case, docket activity alone can be misleading because it may not

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[9] Goodyear and its attorneys chose not to submit their own billing records for comparison purposes. While there is no requirement that they do so, the Ninth Circuit has recognized that comparing the time spent by the opposing side can be a "useful guide in evaluating the appropriateness of time claimed." *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2007). If Goodyear and its attorneys actually believed that Plaintiffs spent close to *five thousand hours* more than necessary, their own billings of far fewer hours would have been powerful and persuasive evidence in support of that position.

reflect time spent in discovery. In this case, the time spent in discovery was massive and greatly inflated because of the misconduct by Goodyear and its attorneys. Accordingly, the general complaint by Goodyear and its attorneys that Plaintiffs' counsel spent too much time on this case, when the monumental expenditure of time was caused by their repeated misconduct, is not convincing.

Despite the unreasonably low number of hours proposed by Goodyear and its attorneys, the number of hours Plaintiffs have requested does appear high. Therefore, the Court has looked to the Code H objections with great care. But having examined the associated time entries, most of the Code H objections do not have merit. It is important to note that many of the Code H objections stem from billings directly connected to the sanctions proceedings. During that time, Plaintiffs' counsel was responding to the actions and filings by teams of lawyers representing Goodyear, Mr. Hancock, and Mr. Musnuff. Plaintiffs' counsel was also attempting to conduct discovery to further substantiate their misconduct claims. In light of the accelerated briefing and discovery deadlines during the sanctions proceedings, it is not surprising that Plaintiffs' counsel put in a great deal of work in a short time period. *See, e.g.*, time entries dated 4/17/12 to 4/26/12 (billing approximately nine hours per day).

Based on the Court's years-long familiarity with this case, the appropriate adjustments for excessive billing are set forth on Appendix C. If not referenced, the Code H objections are overruled.

ix. Code I Objections

Code I refers to fees for "recreating time entries and preparing the fee application." Because this case

originally had no prospect of an attorneys' fee award, Plaintiffs' counsel did not have the normal incentive to keep contemporaneous time records. Thus, the need to recreate time entries was a direct result of the sanctionable conduct. Therefore, the time recreating Plaintiffs' time records will be allowed. Also, there is no reason to disallow the time Plaintiffs spent in litigating the fees issue. *See, e.g.*, *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) ("[I]t would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee."). Thus, the Code I objections are overruled.

II. Conclusion

Based on the foregoing, the Court makes the following adjustments.

Objection	Standard Adjustment	Contingent Adjustment
Code A	$29,310 (20% of $146,550)	$29,310
Code B	0	0
Code C	$32,117 ($39,117 - $7,000)	$32,117
Code D	$4,880.73 (unsupported costs)	$4,880.73
Code E	0	0
Code F	0	$722,406.52
Code G	$50,721 ($88,060.50 - $37,339.50)	$50,721
Code H	$25,827.50 ($90,927.50 - $65,100)	$25,827.50
Code I	0	0
TOTAL	$142,856.23	$865,262.75

Plaintiffs' starting figure of $2,884,057.39, reduced by the standard adjustment, results in a lodestar of $2,741,201.16 in attorneys' fees and costs. There is no reason to adjust this figure. *See Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 n.11 (9th Cir. 2012) ("After computing the 'lodestar,' the district court may then adjust the figure upward or downward taking into consideration twelve 'reasonableness' factors . . . . "). The Court previously determined 20% of the award would be apportioned to Mr. Hancock while Mr. Musnuff and Goodyear would be responsible for 80%.

In the alternative, the starting figure of $2,884,057.39 reduced by the standard adjustment as well as the adjustment for harm not directly linked to the misconduct (Code F objections) results in a lodestar of $2,018,794.64. There is no reason to adjust this amount. *Id.* Therefore, if necessary, the Court would enter judgment, appropriately apportioned, in that amount.

Accordingly,

IT IS ORDERED the Clerk of Court is directed to enter judgment in favor Plaintiffs and against Graeme Hancock in the amount of $548,240.23 and against Basil J. Musnuff and the Goodyear Tire and Rubber Co. in the amount of $2,192,960.93.

DATED this 26th day of August, 2013.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

Appendix A

Date	Billed Amount	Hourly Rate	Original Total	Adjusted Hours	Adjusted Amount for Inadequate Description
11/8/2006	0.2	165	33	0	0
11/9/2006	2	500	1000	1	500
11/13/2006	0.2	500	100	0	0
11/15/2006	0.3	500	150	0	0
11/30/2006	1.4	500	700	0	0
12/4/2006	0.1	500	50	0	0
12/19/2006	1.2	500	600	0	0
1/3/2007	8.5	500	4250	4	2000
1/24/2007	0.2	500	100	0	0
1/28/2007	4.8	500	2400	0	0
1/29/2007	2	500	1000	0	0
5/15/2007	0.9	500	450	0	0
5/15/2007	0.3	500	150	0	0
5/19/2007	9.7	500	4850	4	2000
5/20/2007	10.1	500	5050	5	2500
5/29/2007	0.1	500	50	0	0
5/29/2007	0.2	500	100	0	0
6/1/2007	0.5	500	250	0	0
7/16/2007	0.2	500	100	0	0
7/17/2013	0.8	500	400	0	0
7/19/2007	0.3	500	150	0	0
8/1/2007	0.1	500	50	0	0
8/7/2007	0.1	500	50	0	0
8/14/2007	0.2	500	100	0	0
8/15/2007	2.8	500	1400	0	0
8/16/2007	0.1	500	50	0	0
9/17/2007	0.1	500	50	0	0
10/4/2007	0.5	500	250	0	0
10/15/2007	0.2	500	100	0	0

10/15/2007	0.5	500	250	0	0
10/22/2007	0.8	500	400	0	0
10/25/2007	0.3	500	150	0	0
10/30/2007	0.5	500	250	0	0
11/5/2007	0.8	500	400	0	0
11/5/2007	0.2	500	100	0	0
11/6/2007	0.3	500	150	0	0
11/7/2007	0.1	500	50	0	0
11/7/2007	0.2	500	100	0	0
11/9/2007	0.5	500	250	0	0
11/13/2007	0.2	500	100	0	0
11/13/2007	0.2	500	100	0	0
11/16/2007	0.1	500	50	0	0
11/29/2007	0.3	500	150	0	0
12/6/2007	0.3	500	150	0	0
12/20/2007	0.1	500	50	0	0
12/20/2007	0.2	500	100	0	0
12/29/2007	0.2	500	100	0	0
12/29/2007	0.1	500	50	0	0
1/14/2008	4.2	500	2100	0	0
1/23/2008	0.2	500	100	0	0
2/29/2008	0.2	500	100	0	0
3/14/2008	0.1	500	50	0	0
3/25/2008	0.1	500	50	0	0
3/26/2008	0.1	500	50	0	0
3/26/2008	0.3	500	150	0	0
4/3/2008	0.3	500	150	0	0
4/4/2008	0.3	500	150	0	0
4/11/2008	0.1	500	50	0	0
4/14/2008	0.4	500	200	0	0
4/14/2008	0.1	500	50	0	0
4/23/2008	0.3	500	150	0	0
4/24/2008	0.2	500	100	0	0
6/13/2008	0.6	500	300	0	0
6/16/2008	0.6	500	300	0	0

6/17/2008	0.2	500	100	0	0
6/17/2008	0.5	500	250	0	0
6/19/2008	0.1	500	50	0	0
6/25/2008	0.2	500	100	0	0
6/26/2008	0.2	500	100	0	0
6/30/2008	0.9	500	450	0	0
7/17/2008	0.2	500	100	0	0
7/23/2008	0.2	500	100	0	0
8/3/2008	0.3	500	150	0	0
8/5/2008	0.2	500	100	0	0
8/11/2008	0.1	500	50	0	0
8/11/2008	0.4	500	200	0	0
8/12/2008	0.1	500	50	0	0
8/22/2008	0.4	500	200	0	0
8/23/2008	0.1	500	50	0	0
8/23/2008	0.1	500	50	0	0
8/26/2008	0.5	500	250	0	0
8/26/2008	0.1	500	50	0	0
8/26/2008	0.1	500	50	0	0
8/26/2008	0.2	500	100	0	0
8/27/2008	0.2	500	100	0	0
8/27/2008	0.8	500	400	0	0
8/28/2008	0.2	500	100	0	0
8/29/2008	0.5	500	250	0	0
8/29/2008	0.1	500	50	0	0
8/29/2008	0.3	500	150	0	0
9/7/2008	0.1	500	50	0	0
9/9/2008	1	500	500	0	0
9/12/2008	0.2	500	100	0	0
9/23/2008	0.3	500	150	0	0
10/5/2008	0.2	500	100	0	0
10/15/2008	0.2	500	100	0	0
10/20/2008	0.2	500	100	0	0
11/12/2008	0.4	500	200	0	0
11/20/2008	0.2	500	100	0	0

11/24/2008	0.1	500	50	0	0
1/2/2009	0.8	500	400	0	0
1/13/2009	0.1	500	50	0	0
3/2/2009	0.2	500	100	0	0
4/2/2009	0.2	500	100	0	0
4/7/2009	0.1	500	50	0	0
4/8/2009	0.1	500	50	0	0
6/24/2009	0.6	500	300	0	0
6/29/2009	0.5	500	250	0	0
7/8/2009	0.1	500	50	0	0
8/8/2009	0.3	500	150	0	0
3/25/2010	0.1	500	50	0	0
3/25/2010	0.1	500	50	0	0
3/21/2012	0.5	500	250	0	0
4/5/2012	0.1	500	50	0	0
3/6/2008	0.1	345	34.5	0	0
5/20/2008	0.1	345	34.5	0	0
3/13/2012	0.6	425	255	0	0
4/5/2012	0.3	425	127.5	0	0
4/16/2012	0.6	425	255	0	0
4/19/2012	0.6	425	255	0	0
4/29/2012	0.5	445	222.5	0	0
TOTALS	78.8		$39,117.00	14	$7,000.00

Appendix B

Date	Billed Amount	Hourly Rate	Original Total	Adjusted Hours	Adjusted Amount for Non-clerical work
11/6/2006	1.8	165	297	1.4	231
11/7/2006	0.2	165	33	0	0
11/17/2006	6.6	165	1089	4	660
11/22/2006	5.2	165	858	3.5	577.5
11/27/2006	7.3	165	1204.5	5	825
12/1/2006	4.4	165	726	3	495
12/7/2006	4.7	165	775.5	2	330
12/8/2006	0.8	165	132	0.4	66
12/11/2006	1.2	165	198	0.6	99
12/14/2006	1.1	165	181.5	0.6	99
12/15/2006	3.7	165	610.5	2	330
12/18/2006	7.2	165	1188	5	825
12/19/2006	4.3	165	709.5	2	330
1/3/2007	0.3	165	49.5	0	0
1/23/2007	2	165	330	0	0
1/30/2007	0.4	165	66	0	0
1/31/2007	3.9	165	643.5	0	0
2/1/2007	2.8	165	462	1	165
2/7/2007	3.1	165	511.5	1.5	247.5
2/8/2007	5.4	165	891	3	495
2/9/2007	3.3	165	544.5	1.5	247.5
2/12/2007	7.5	165	1237.5	3	495
2/13/2007	6.3	165	1039.5	3	495
2/27/2007	2.1	165	346.5	1.4	231
2/28/2007	2.5	165	412.5	1	165
3/1/2007	0.7	165	115.5	0	0
3/14/2007	2.3	165	379.5	0	0
3/15/2007	6	165	990	0	0
3/16/2007	5	165	825	2.5	412.5

3/27/2007	0.2	165	33	0	0
3/28/2007	1.4	165	231	0	0
4/4/2007	0.2	165	33	0	0
4/5/2007	0.3	165	49.5	0.1	16.5
4/6/2007	4.7	165	775.5	1.5	247.5
4/6/2007	0.3	165	49.5	0	0
4/7/2007	3.4	165	561	0	0
4/9/2007	1.9	165	313.5	0	0
4/10/2007	2.3	165	379.5	0.5	82.5
4/11/2007	0.2	165	33	0	0
4/12/2007	0.2	165	33	0	0
4/18/2007	0.3	165	49.5	0.2	33
4/18/2007	1.3	165	214.5	0.7	115.5
4/20/2007	0.3	165	49.5	0.1	16.5
4/23/2007	0.5	165	82.5	0.2	33
4/24/2007	0.3	165	49.5	0	0
4/26/2007	7.2	165	1188	7.1	1171.5
4/30/2007	0.2	165	33	0	0
4/30/2007	1.2	165	198	0.5	82.5
5/1/2007	0.1	165	16.5	0	0
5/2/2007	0.8	165	132	0.4	66
5/3/2007	0.9	165	148.5	0.5	82.5
5/4/2007	2.2	165	363	1	165
5/4/2007	2.7	165	445.5	2	330
5/7/2007	5.4	165	891	4	660
5/8/2007	6.3	165	1039.5	4	660
5/9/2007	6.8	165	1122	4	660
5/11/2007	3.3	165	544.5	1.5	247.5
5/14/2007	1.3	165	214.5	0.5	82.5
5/15/2007	6.4	165	1056	4	660
5/16/2007	1.6	165	264	0	0
5/18/2007	7.2	165	1188	3	495
5/20/2007	5.3	165	874.5	1	165
5/21/2007	1.5	165	247.5	0.2	33
5/23/2007	1.1	165	181.5	0	0

5/30/2007	7.5	165	1237.5	6	990
5/31/2007	5.9	165	973.5	3	495
6/1/2007	7.3	165	1204.5	1	165
6/6/2007	0.1	165	16.5	0	0
6/11/2007	7.2	165	1188	2	330
6/13/2007	8.2	165	1353	0	0
6/15/2007	7.3	165	1204.5	2	330
6/21/2007	7.6	165	1254	3	495
6/22/2007	8.1	165	1336.5	6	990
6/25/2007	6.8	165	1122	3	495
6/26/2007	3.4	165	561	3	495
6/27/2007	7.3	165	1204.5	2	330
6/28/2007	7.2	165	1188	5	825
7/2/2007	7.8	165	1287	4	660
7/3/2007	5.2	165	858	1	165
7/5/2007	7.5	165	1237.5	3	495
7/10/2007	1.2	165	198	0.5	82.5
7/24/2007	1.2	165	198	0	0
7/25/2007	0.7	165	115.5	0.2	33
7/26/2007	0.2	165	33	0	0
7/27/2007	2.7	165	445.5	0.7	115.5
7/30/2007	2.8	165	462	1	165
7/31/2007	3.9	165	643.5	0	0
8/1/2007	0.5	165	82.5	0.2	33
8/10/2007	0.5	165	82.5	0	0
8/10/2007	2.5	165	412.5	0.5	82.5
8/21/2007	1	165	165	0	0
8/22/2007	1.8	165	297	0.4	66
8/24/2007	0.5	165	82.5	0	0
8/28/2007	0.2	165	33	0	0
8/30/2007	6.8	165	1122	1.5	247.5
9/4/2007	0.9	165	148.5	0.2	33
9/5/2007	0.5	165	82.5	0	0
9/7/2007	1.2	165	198	0	0
9/9/2007	1.1	165	181.5	0	0

9/11/2007	5.8	165	957	2.5	412.5
9/18/2007	7	165	1155	2.5	412.5
9/19/2007	4.4	165	726	1.5	247.5
9/20/2007	3.8	165	627	1.2	198
9/21/2007	3.5	165	577.5	1.5	247.5
9/24/2007	4.8	165	792	1.5	247.5
9/27/2007	4.7	165	775.5	3	495
9/28/2007	6.1	165	1006.5	1	165
10/2/2007	3.7	165	610.5	1	165
10/5/2007	6.2	165	1023	2	330
10/9/2007	3.6	165	594	3	495
10/10/2007	5.8	165	957	4.5	742.5
10/11/2007	4.4	165	726	4	660
10/12/2007	7.7	165	1270.5	7	1155
10/15/2007	3.1	165	511.5	1.7	280.5
10/19/2007	0.7	165	115.5	0	0
10/22/2007	1.3	165	214.5	0	0
10/23/2007	2.8	165	462	1	165
10/24/2007	1.2	165	198	0.5	82.5
10/26/2007	1.2	165	198	0.6	99
11/18/2007	1.8	165	297	0	0
11/19/2007	0.8	165	132	0.5	82.5
11/21/2007	0.5	165	82.5	0	0
11/27/2007	1.4	165	231	0	0
11/28/2007	2.8	165	462	1.8	297
11/30/2007	0.3	165	49.5	0.1	16.5
11/30/2007	1.4	165	231	1	165
12/3/2007	1.6	165	264	0.5	82.5
12/4/2007	0.3	165	49.5	0	0
12/11/2007	1.4	165	231	0.4	66
12/12/2007	0.9	165	148.5	0.3	49.5
12/18/2007	1.3	165	214.5	0	0
12/20/2007	1.7	165	280.5	0.4	66
12/28/2007	0.7	165	115.5	0.5	82.5
1/4/2007	4.1	165	676.5	0	0

1/7/2008	2.8	165	462	0	0
1/9/2008	0.8	165	132	0.1	16.5
1/15/2008	1	165	165	0.1	16.5
1/22/2008	1.7	165	280.5	0	0
1/24/2008	0.5	165	82.5	0	0
1/30/2008	0.8	165	132	0.1	16.5
2/12/2008	5.7	165	940.5	4	660
2/20/2008	4.2	165	693	3	495
2/25/2008	2.2	165	363	0	0
3/10/2008	3.8	165	627	0	0
3/13/2008	4	165	660	0	0
3/16/2008	4	165	660	3	495
3/19/2008	3.7	165	610.5	3	495
4/2/2008	3.7	165	610.5	3	495
4/3/2008	0.2	165	33	0	0
4/21/2008	4.7	165	775.5	3	495
4/22/2008	5.6	165	924	4	660
4/28/2008	2.8	165	462	2	330
5/1/2008	5.7	165	940.5	4	660
5/2/2008	1.7	165	280.5	1.5	247.5
5/5/2008	5.9	165	973.5	4	660
5/9/2008	5.5	165	907.5	2	330
5/12/2008	3.4	165	561	2	330
5/13/2008	6.7	165	1105.5	5	825
5/20/2008	4.8	165	792	0	0
5/21/2008	11.1	165	1831.5	0	0
5/27/2008	0.7	165	115.5	0	0
5/28/2008	1.9	165	313.5	1	165
5/29/2008	3.5	165	577.5	0	0
6/18/2008	0.5	165	82.5	0	0
7/16/2008	0.5	165	82.5	0	0
4/2/2010	0.8	165	132	0	0
4/6/2010	0.9	165	148.5	0	0
4/9/2010	1.4	165	231	0	0
4/10/2010	0.4	165	66	0.2	33

4/11/2010	0.4	165	66	0.2	33
4/12/2010	2.9	165	478.5	1	165
4/13/2010	2.8	165	462	1	165
4/14/2010	1.2	165	198	0	0
TOTALS	533.7		$88,060.50	226.3	$37,339.50

Appendix C

Date	Billed Amount	Hourly Rate	Original Total	Adjusted Hours	Adjusted Amount for Reasonableness
5/19/2007	9.7	500	4850	8	4000
5/20/2007	10.1	500	5050	8	4000
5/21/2007	12	500	6000	9	4500
9/18/2009	8	500	4000	6	3000
4/9/2010	8.5	500	4250	8	4000
4/13/2010	5	500	2500	2	1000
4/13/2010	7	500	3500	4	2000
3/16/2011	8.9	500	4450	8	4000
10/5/2011	7.8	500	3900	6	3000
10/5/2011	8.2	500	4100	6	3000
10/8/2011	8.1	500	4050	6	3000
10/9/2011	9.7	500	4850	6	3000
10/10/201	10.1	500	5050	6	3000
3/12/2012	9.2	500	4600	8	4000
3/13/2012	8.6	500	4300	8	4000
3/21/2012	8.2	500	4100	4	2000
3/22/2012	11.2	425	4760	8	3400
5/30/2012	11.1	425	4717.5	8	3400
6/18/2012	9.8	425	4165	6	2550
6/20/2012	9.8	425	4165	6	2550
7/2/2012	6.8	425	2890	4	1700
11/8/2012	1.6	425	680	0	0
TOTALS	189.4		$90,927.50	135	$65,100.00

APPENDIX E

UNITED STATES. COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 03/09/16]

No. 12-17718

D.C. No. 2:05-cv-02046-ROS

District of Arizona, Phoenix

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation,

Defendant-Appellant,

And

SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation,

Defendants,

v.

ROETZEL & ANDRESS, LPA; BASIL J. MUSNUFF,

Movants.

No. 13-16801

D.C. No. 2:05-cv-02046-ROS

District of Arizona, Phoenix

LEROY HAEGER; DONNA HAEGER,
husband and wife; BARRY HAEGER;
SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

GOODYEAR TIRE & RUBBER COMPANY,
an Ohio corporation,

Defendant-Appellant.

No. 13-16861

D.C. No. 2:05-cv-02046-ROS

District of Arizona, Phoenix

LEROY HAEGER; DONNA HAEGER,
husband and wife; BARRY HAEGER;
SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

GOODYEAR TIRE & RUBBER COMPANY,
an Ohio corporation; SPARTAN MOTORS, INC.,
a Michigan corporation; GULFSTREAM COACH, INC.,
an Indiana corporation,

Defendants,

v.

BASIL J. MUSNUFF,

Movant-Appellant.

No. 13-16862

D.C. No. 2:05-cv-02046-ROS

District of Arizona, Phoenix

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife

Plaintiffs-Appellees,

v.

GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation; SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation,

Defendants,

v.

FENNEMORE CRAIG, P.C.; GRAEME HANCOCK,

Movants-Appellants.

ORDER

Before: WALLACE, M. SMITH, and WATFORD, Circuit Judges.

Appellants Goodyear Tire & Rubber Company, Basil J. Musnuff, Graeme Hancock, and Fennemore Craig, P.C. each filed a motion to stay the issuance of the mandate pending application for writ of certiorari. Fed. R. App. 41(d)(2). The motions are GRANTED. The mandate is stayed for ninety (90) days from the date of this order, pending Appellants' filing of a petition for writ of certiorari in the Supreme Court. If such a

petition is filed, the stay shall continue until final disposition by the Supreme Court.

Judge Wallace dissents, and votes to deny the motion to stay the issuance of the mandate.

No. 15-1406

In The
Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit's determination that the monetary sanctions awarded to the Haegers, based on the attorneys' fees and costs they were forced to incur in a "sham litigation," were compensatory does not conflict with a decision of this Court or another circuit of the Court of Appeals.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Ninth Circuit's affirmance of sanctions on Goodyear was based on numerous findings that, commencing almost immediately and continuing throughout the litigation, Goodyear directly participated in bad faith conduct (and not based solely on the misconduct of Goodyear's attorneys) does not conflict with a decision of this Court or another circuit of the Court of Appeals.

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RULE

Sup. Ct. R. 10 3

INTRODUCTION

The underlying proceedings and resulting decisions by the district court and the Ninth Circuit address carefully-orchestrated fraud involving years of willful deceptions, including bad faith discovery conduct, repeated misrepresentations to the court and the Haegers, and false deposition testimony during discovery, none of which was discovered until after the case had been settled. These deceptions concealed, for the entire five years of litigation, critically-important test data which the Haegers had requested regarding the Goodyear G159 tire, and sent the Haegers on a completely misdirected frolic. The district court found these deceptions so extensive that they "permeated the entirety of this case," App. 180a, and the Ninth Circuit agreed that Goodyear's misconduct "caused significant harm in forcing the Haegers to engage in sham litigation and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses." App. 30a.

During more than two years of post-settlement, sanctions-related litigation in the district court, Goodyear and its lawyers filed fifteen briefs, participated in discovery and presented testimony at a six-hour evidentiary hearing. After that thorough process, the district court painstakingly detailed in a 66-page order a long list of sanctionable misconduct, which "continued throughout the entire litigation, including post-dismissal." App. 159a; *see generally* App. 83a-172a. The order included 49 pages of findings of fact and 17 pages of legal analysis and conclusions. App. 6a. At the heart

of the district court's findings was a recognition that Goodyear's in-house attorney "was always the final decision maker regarding discovery responses" (App. 88a), and she knew "that Goodyear's responses in the present case were grossly inaccurate." App. 139a.

Ultimately, relying upon the date of the first definitive proof that Goodyear was treating litigation as a game of hide and seek, the district court held that "the most appropriate sanction is to award Plaintiffs [the Haegers] *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request."[1] App. 152a (emphasis in original). The court found Goodyear responsible for 80% of that amount, or $2,192,960.93. App. 169a-170a, 185a.

The Ninth Circuit unanimously upheld the district court's findings that Goodyear and its attorneys engaged in bad faith, sanctionable misconduct. App. 18a ("the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case"); App. 43a (Watford, J., dissenting) (stating that the district court "approached the task . . . with great thoroughness and care," and "I agree with the majority that the district court's misconduct findings are supported by the record"). The panel also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 21a

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[1] Goodyear's supplemental responses were provided on November 1, 2006, seventeen months after the suit was commenced. App. 89a.

("We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case,"); App. 43a (Watford, J., dissenting) ("The district court's finding of bad faith authorized it to levy sanctions under its inherent power.").

Goodyear has presented no compelling reasons for granting its petition. *See* Sup. Ct. R. 10. It first claims that the Ninth Circuit's decision conflicts with this Court's decision in *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), and decisions of other circuits, which hold that compensatory sanctions must be causally connected to the sanctioned misconduct. Contrary to Goodyear's assertion, there is no conflict; the Ninth Circuit held that there was an appropriate causal link between the fees and costs awarded to the Haegers and Goodyear's egregious misconduct. Moreover, Goodyear fails to disclose in its petition that even Goodyear (and its attorneys) admitted in the district court that all but approximately $722,000 of the fees and costs for which the Haegers sought reimbursement "result[ed] from Goodyear's allegedly sanctionable conduct," ER1352; *see also* ER1352-1354, and that admission resulted in an alternative, contingent award which effectively moots most of Goodyear's argument.

Petitioners also claim that the Ninth Circuit's decision conflicts with this Court's decisions and the Eleventh Circuit by allowing sanctions to be imposed against Goodyear based solely on the bad faith misconduct of Goodyear's attorneys. Again, there is no

conflict. Sanctions were not imposed against Goodyear based solely on the bad faith misconduct of its attorneys. Instead, the district court found numerous instances in which Goodyear itself directly engaged in bad faith misconduct, and Goodyear did not challenge most of those findings as clearly erroneous in the Ninth Circuit, and has not asked this Court to review the Ninth Circuit's unanimous affirmance of those findings here. Accordingly, this Court's review is unwarranted, and the Petition should be denied.

STATEMENT OF THE CASE

Even though the district court's findings of fact must be accepted as true on review unless clearly erroneous, *see Amadeo v. Zant*, 486 U.S. 214, 225-226 (1988) ("where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"), Goodyear improperly disregards the district court's findings. Instead (without even arguing that the district court's findings are clearly erroneous), Goodyear presents its own, one-sided and highly selective version of the facts, which the district court already rejected. *See, e.g.*, Petition at 4 (relying on facts "[a]s explained in Goodyear's Ninth Circuit briefing"). Indeed, the district court specifically found that many aspects of Goodyear's version of the facts are unreasonable, not credible and even untruthful.[2]

[2] For example, Goodyear asserts that it did not produce the concealed tests in response to the Haegers' first discovery requests because its attorneys had "concluded that Plaintiffs' counsel had

Accordingly, many of Goodyear's assertions of fact are contrary to the actual, controlling facts.

The Haegers commenced this action against Goodyear in June 2005, alleging that defects in the design of Goodyear's G159 tire resulted in a motor home accident which caused severe harm to the Haegers. App. 8a. Goodyear was represented by Basil Musnuff ("Musnuff") (an attorney with Roetzel & Andress, LPA, who acted as lead trial counsel and national coordinating counsel for all G159 cases throughout the country between 2003 and 2010), and Graeme Hancock ("Hancock") (an attorney with Fennemore Craig, P.C., who served as local counsel for Goodyear). App. 8a. Goodyear was embroiled in G159 tire litigation commencing in 1999. App. 113a, n.13.

The Haegers' case theory was that, when the G159 tire is used on motor homes at highway speeds, the tire produces a level of heat which it was not designed to endure, leading to tire failure. App. 9a. The Haegers repeatedly requested production of test data which would have revealed the operating temperature of the tire. App. 85a-86a, 89a-91a, 98a, 105a, 108a-110a. None was disclosed. "Goodyear's obstructive discovery practices prior to 2006 were successful in keeping the additional testing concealed." App. 113a, n.13. The concealed tests later revealed that Goodyear knew the tire

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agreed to narrow the scope of their first request." Petition at 5. But the district court rejected this "fact," finding instead that "it is now clear [Goodyear and Musnuff] did not adopt this position until they were faced with sanctions." App. 160a.

was generating temperatures far in excess of 200 degrees at highway speeds. Knowing that Goodyear and its attorneys had concealed all test data revealing the operating temperature of the tire at highway speeds, Goodyear's experts admitted that "anything over 200 [degrees] could cause separation." App. 145a.

Thus, the egregious misconduct of Goodyear and its attorneys deprived the Haegers of the crucial temperature evidence supporting their claims. Consequently, after five years of litigation based on a false set of facts Goodyear and its attorneys had created, resulting in completely misguided discovery and misdirected expert disclosures, the Haegers and Goodyear reached a settlement on April 14, 2010. App. 13a.

Sometime after the settlement, the Haegers' counsel saw an article stating that Goodyear had produced in a Florida suit ("*Schalmo*") internal heat and speed testing related to the G159 tire which the Haegers had repeatedly requested but never received. App. 13a. Goodyear eventually admitted that it had not disclosed the requested tests, but Goodyear and its attorneys attempted to justify that concealment with "a dizzying array of misstatements and simple falsehoods." App. 137a.

On May 31, 2011, the Haegers filed a motion for sanctions. App. 13a. After that motion had been fully briefed, the district court found that there were "serious questions regarding [Goodyear's] conduct in this case," and ordered Goodyear to produce "the test results at issue." App. 14a. Even then, Goodyear disclosed only

a single test (the Heat Rise test), "but kept numerous other tests concealed" which showed temperatures well in excess of 200 degrees at highway speeds. App. 14a, 128a.

On February 24, 2012, the district court issued a proposed order, in which the court described possible sanctionable misconduct, but also stated that the record did not indicate who was responsible for each instance of misconduct or the amount and allocation of sanctions. App. 14a, 81a-82a. The district court then allowed Goodyear and its attorneys ample opportunity to respond to the matters addressed in the proposed order. Between March and July of 2012, Goodyear, Musnuff and Hancock each filed multiple briefs, totaling 1,111 pages.[3] The district court also held an evidentiary hearing on March 22, 2012, at which both Hancock and Musnuff testified under oath. App. 15a. At the conclusion of the hearing, the district court granted the Haegers' requests to conduct additional discovery to address representations made at the hearing.

On November 8, 2012, the district court issued a 66-page order, which carefully cataloged the sanctionable misconduct, which included concealing critical test data, making intentional misrepresentations to

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[3] ER288-339, ER340-356, ER357-372, ER395-408, ER409-412, ER413-496, ER497-510, ER511-533, ER573-706, ER873-1065, ER1066-1085, ER1086-1108, ER1200-1242, ER1247-1250, ER2163-2250, ER2392-2513, ER2541-2595, ER2596-2600, SER082-127, SER277-303, SER304-318, SER917-931, SER953-973, SER974-996, SER997-1017, SER1018-1035.

the court and the Haegers' counsel throughout all five years of the underlying litigation, and even lying to the court during the sanctions proceedings. App. 83a-172a. The following is just a sample of the district court's numerous findings specifically as to Goodyear's own bad faith misconduct:

- Goodyear's in-house attorney, Deborah Okey, "retained final say regarding discovery responses." App. 139a. "Ms. Okey was always the final decision maker regarding discovery responses." App. 88a. The district court found that Goodyear's objections to the Haegers' discovery requests – which Ms. Okey reviewed and approved – were "not made in good faith." App. 160a-163a.

- Even though both Musnuff and Hancock recommended to Goodyear that Goodyear's responses to the Haeger's first request should be supplemented with testing of the tire at various speeds, "the record is clear . . . that no supplementation ever occurred." App. 93a-94a.

- Ms. Okey knew that Goodyear's responses "were grossly inaccurate." App. 139a. She also "knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior." App. 164a.

- "[T]he repeated representations by Goodyear . . . that Plaintiffs did not state the legal theory of this case until January 7, 2007 is incorrect . . . and now appears to have been part of a general strategy to obstruct and delay discovery." App. 87a, n.5.

- "[D]espite knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith." App. 163a.

- "Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. . . . [T]his means Goodyear . . . knowingly concealed documents in the present litigation." App. 122a.

- During the sanction proceedings, Ms. Okey made statements in a sworn declaration regarding production of test data which the district court found "were either misleading or false." App. 133a.

- "It is now clear that Goodyear's 30(b)(6) witness [Richard Olsen] testified falsely at his deposition regarding the [concealed tests]. Therefore, the claim that Goodyear itself did not deliberately conceal *any* 'G159 Tire test results' is not true." App. 139a (emphasis in original); *see also* App. 166a. When Mr. Olsen offered a declaration in the sanctions proceedings in an attempt "to explain how his testimony during his deposition was accurate . . . Mr. Olsen accidentally revealed it was not." App. 134a. "In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity

emerged only as a result of Goodyear's inability to keep its falsehoods straight. . . . The only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith." App. 135a-136a.

- "Goodyear employees knew the Heat Rise tests and other tests were responsive to the Third Request. There is no acceptable justification for the failure to provide all responsive documents to the Third Request." App. 165a. "Goodyear engaged in a bad faith attempt to conceal documents when they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request." App. 164a.

- Goodyear's "outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests." App. 169a.

- "Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, . . . Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior." App. 150a-151a.

- When the district court ordered Goodyear to produce "the test results at issue" during the sanction proceedings, Goodyear continued to conceal most of them. App. 128a.

In short, the district court found that Goodyear's sanctionable misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal," and "permeated the entirety of this case." App. 159a, 180a.

The district court then turned to the task of crafting an appropriate sanction to compensate the Haegers for the harm caused by Goodyear's (and the others') pervasive misconduct. As the Ninth Circuit stated, "[t]he district court then conducted an exhaustive analysis of the documentation submitted by Plaintiffs," "spent considerable time reviewing *each* time entry," and "with painstaking attention to detail, made adjustments based on Goodyear's objections." App. 17a (emphasis in original). Ultimately, the district court reduced some of the fees and costs the Haegers sought, and found that the Haegers should be "reimbursed" a total of $2,741,201.16. *Id.* The district court held Hancock responsible for twenty percent of that amount, and "Musnuff and Goodyear were held jointly responsible for the remaining eighty percent of the fees and costs." *Id.*

The district court also made an alternative, smaller, "contingent award" which was intended to apply only if the full award was found on appeal not to have a sufficient causal link to the misconduct of

Goodyear and its attorneys. App. 180a, 185a; ER1272. Specifically, based on the admission by Goodyear (and its attorneys) that all but $722,406.52 of the fees and costs for which the Haegers sought reimbursement "result[ed] from Goodyear's allegedly sanctionable conduct," ER1352; *see also* ER1352-1354, the district court's alternative award reduced the sanction by $722,406.52 (or a total of $2,018,794.64). App. 185a.

On appeal, the Ninth Circuit unanimously upheld the district court's findings that Goodyear (and the others) engaged in bad faith, sanctionable misconduct. App. 18a, 43a. It also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 21a, 43a. The dissenting judge parted ways with the majority solely on the issue of whether there was a sufficient causal link between all the fees and costs awarded and the sanctioned misconduct. App. 49a-50a. Relying on this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991), that "the full attorney's fees were warranted [as a sanction] due to the frequency and severity of Chambers's abuses of the judicial system," the majority held that the district court "appropriately awarded the Haegers all their attorneys' fees and costs in prosecuting the action once the Sanctionees began flouting their clear discovery obligations and engaging in frequent and severe abuses of the judicial system." App. 31a-32a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S HOLDING THAT A CAUSAL LINK EXISTS BETWEEN FEES AWARDED THE HAEGERS AND GOODYEAR'S MISCONDUCT DOES NOT CONFLICT WITH *BAGWELL* OR OTHER CIRCUITS.

Goodyear's contention that the Ninth Circuit's decision conflicts with decisions by this Court and other circuits is built on the erroneous assertion that "the Ninth Circuit majority in this case expressly declined to require a causal connection between the sanctioned conduct and the civil monetary sanction imposed." Petition at 1; *see also id.* at 14 (accusing the Ninth Circuit of altogether "[d]ispensing with a 'linkage' requirement"). That assertion is simply not true; the Ninth Circuit did not ignore the causal-link requirement. To the contrary, the Ninth Circuit expressly concluded that "there is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation, and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses of the Sanctionees."[4] App. 30a (emphasis added).

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[4] Goodyear contends that the district court's finding that "the case more likely than not would have settled much earlier" if Goodyear and its attorneys had not engaged in the sanctioned misconduct (thereby saving the Haegers from incurring the fees and costs awarded to them), App. 152a, should be rejected because when Goodyear produced the concealed tests in *Schalmo*, that case did not immediately settle. Petition at 16. This contention fails for at least two reasons. First, Goodyear did not challenge this finding as "clearly erroneous" on appeal to the Ninth Circuit,

Furthermore, in addition to acknowledging the causation requirement, the Ninth Circuit also carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded when a court invokes its inherent power." App. 30a (emphasis added). Relying on this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Ninth Circuit held that the district court had appropriately awarded:

> the amount the court reasonably believed it cost the Haegers to litigate against a party and attorneys during the time when that party and those attorneys were acting in bad faith. Nothing more is required under *Chambers* or our case law. . . .

App. 33a. Indeed, the Ninth Circuit concluded that Goodyear's argument that something more is needed to establish causation is "virtually identical to the causation requirement claim" this Court rejected in *Chambers*. App. 31a (quoting *Chambers*, 501 U.S. at 57 (rejecting the argument that "the fact that the entire amount of fees was awarded means that the District

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and similarly has not asked this Court to review the underlying findings for clear error. Second, Goodyear ignores the uncontested finding that "in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had 'said the tire would foreseeably fail at [temperatures] above 200 degrees.'" App. 145a. Disclosure of the concealed tests showing that the temperature of the G159 tire when operated at highway speeds greatly exceeded 200 degrees "more likely than not" would have forced Goodyear to settle this case because, unlike in *Schalmo*, Goodyear's experts had already admitted that heat in excess of 200 degrees "can lead to tread separations." App. 144a.

Court failed to tailor the sanction to the particular wrong," and upholding the district court's conclusion "that full attorney's fees were warranted due to the frequency and severity of Chamber's abuses")). Goodyear's actions rendering the entirety of five years of litigation a "sham" unquestionably supports a sanction of all the attorneys' fees and costs which the Haegers were forced to incur.

Accordingly, the Ninth Circuit correctly held that "the district court did all it was required to do" to compensate the Haegers for the damages "they suffered as a *result* of Sanctionees' bad faith." App. 28a (emphasis added). Thus, contrary to Goodyear's assertion, the Ninth Circuit's decision does not conflict with *Bagwell*, 512 U.S. 821 (1994), or any of the cases from other circuits on which Goodyear relies. Thus, this Court's review is not warranted.

Even if a conflict existed, this case is not a proper vehicle to resolve it because Goodyear itself admitted in the district court that most of the monetary sanction awarded to the Haegers was caused by the sanctionable misconduct of Goodyear and its attorneys. Specifically, Goodyear and its attorneys admitted that all but $722,406.52 of the fees awarded to the Haegers "result[ed] from Goodyear's allegedly sanctionable conduct." ER1352; *see also* ER1352-1354. That admission resulted in the district court's alternative, contingent award (App. 180a, 185a) which effectively moots most of Goodyear's argument. Thus, for this additional reason this Court's review is unwarranted.

II. THE NINTH CIRCUIT'S HOLDING THAT GOODYEAR DIRECTLY ENGAGED IN BAD FAITH CONDUCT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

Goodyear also erroneously contends that this Court's review is needed because "the Ninth Circuit rejected the prevailing rule that inherent authority sanctions must be based on subjective bad faith of the individual party, rather than premised on the conduct of others." Petition at 17. But the Ninth Circuit did not reject the individualized bad faith requirement. To the contrary, the Ninth Circuit expressly acknowledged that "bad faith [is] an essential requirement for invoking the district court's inherent powers," App. 28a, and that "[b]efore awarding sanctions pursuant to its inherent power, the court must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." App. 21a (internal quotes omitted).

Furthermore, the Ninth Circuit held that "the district court did not abuse its discretion in concluding that Goodyear participated *directly* in the discovery fraud." App. 27a (emphasis added). Indeed, the dissenting member of the panel agreed that "[t]he district court's finding of bad faith authorized it to levy sanctions under its inherent power." App. 43a. Thus, the Ninth Circuit did not reject the bad-faith requirement, and its decision does not conflict with decisions of this Court.

Moreover, Goodyear is also wrong in asserting that the Ninth Circuit's refusal to allow Goodyear to "pass[] the blame on to its attorneys" (App. 26a) conflicts with the Eleventh Circuit's decision in *Byrne v. Nezhat*, 261 F.3d 1075 (11th Cir. 2001). Petition at 20-21. In *Byrne*, the court overturned sanctions imposed on a client because the district court had "impermissibly relied solely on the actions of counsel." 261 F.3d at 1123. That clearly is not what occurred here. To the contrary, the district court specifically found that Goodyear had directly engaged in numerous instances of its own bad faith conduct, including by its in-house counsel and Rule 30(b)(6) witness. Indeed, the district court found that Goodyear "was always the final decision maker regarding discovery responses." App. 85a. And the Ninth Circuit unanimously affirmed those findings. App. 43a ("I agree with the majority that the district court's misconduct findings are supported by the record,"); *see also Chambers*, 501 U.S. at 41 (affirming sanctions against a party holding that his assertion that the district court "failed to conduct any inquiry into whether he was personally responsible for the challenged conduct . . . is flatly contradicted by the District Court's detailed factual findings").[5] Thus, there is no conflict

---

[5] Goodyear's criticism of a few of the underlying findings of its direct misconduct (Petition at 22-23) must be rejected because Goodyear did not specifically challenge most of these findings as clearly erroneous on appeal, nor is there any basis to overturn the Ninth Circuit's unanimous affirmance of those findings. Additionally, Goodyear's criticism has no merit in any event. For example, with respect to the district court's finding that Goodyear's representatives gave false testimony, Goodyear cites *Byrne* for the

with the Eleventh Circuit, and this Court's review is not warranted.

CONCLUSION

Goodyear has not established any compelling reason for this Court to grant the Petition. Therefore, the Haegers respectfully request that the Petition be denied.

Respectfully submitted,

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proposition that "[s]tanding alone, a false or inconsistent statement in a deposition does not compel the conclusion of bad faith." Petition at 22 (quoting *Byrne*, 261 F.3d at 1125). But the findings of false statements by Ms. Okey and Mr. Olsen do not stand alone; instead, they are among a long list of findings of Goodyear's sanctionable misconduct. Moreover, the district court did not merely find that false statements had been made, but also properly determined that the falsity was deliberate, intentional and part of a calculated plan. *See, e.g.*, App. 135a-136a (finding that Goodyear's 30(b)(6) witness "provided false testimony" and, given the circumstances, "[t]he only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith").

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No. 15-1406

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER; DONNA HAEGER; BARRY HAEGER; SUZANNE HAEGER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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June 30, 2016

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INTRODUCTION

Plaintiffs fail to refute the existence of a circuit split over the causation standard that governs compensatory civil sanctions imposed under a court's inherent powers. As both the majority and dissent in this case acknowledged, the Ninth Circuit rejected a direct causation requirement when sanctions are imposed without the protections of criminal due process. The majority's rule violates this Court's decision in *Int'l Union v. Bagwell*, 512 U.S. 821 (1994), and splits with the authority in other Circuits requiring a direct causal connection between compensatory civil sanctions and the sanctioned conduct. Disregarding the Ninth Circuit's ruling, Plaintiffs imagine that the court found causation satisfied—but that is the exact issue that prompted Judge Watford's dissent. The majority and dissent framed the legal debate precisely, rendering this case an ideal vehicle to explore the circuit split.

Unable to contest the circuit split, Plaintiffs contend that the causation argument is "moot" because the district court calculated an alternative award in the event that the direct causation requirement was enforced. But the Ninth Circuit rejected direct causation and affirmed *the full amount* of the award. Underscoring how this case illustrates the legal principles at hand, the district court itself recognized that nearly $750,000 of the purportedly compensatory civil sanctions could not be directly linked to any misconduct.[1]

---

[1] Goodyear disputes that the district court's $750,000 calculation adequately implemented the causation requirement. In any event, if this Court accepts *certiorari*, remand can determine the appropriate

Finally, Plaintiffs do not defend the Ninth Circuit's holding that attorneys' fees may be imposed as sanctions against a client for the conduct of its attorneys. Conceding that an individualized finding of subjective bad faith is required for compensatory civil sanctions, Plaintiffs do not cite or discuss *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962), the authority primarily relied on by the Ninth Circuit in affirming sanctions against Goodyear.

The Ninth Circuit's conclusory alternative holding that Goodyear participated in the misconduct does not satisfy the high standards that constrain federal courts when imposing sanctions under inherent powers. Sanctions against Goodyear under inherent powers require specific and thorough findings of subjective bad faith, supported by clear and convincing evidence. Echoing the errors of the courts below, Plaintiffs' argument that sanctions are supportable in this case threatens a client's ability to rely on the advice of outside counsel in discovery.

This Court should accordingly accept *certiorari*, and reverse.

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amount (if any) of the sanction based on guidance received from this Court.

ARGUMENT

I. Plaintiffs Fail To Refute That The Ninth Circuit Diverged From This Court And Other Circuits By Rejecting the Direct Causation Rule.

Tacitly conceding a circuit split, Plaintiffs do not address any of the authority from other circuits requiring civil, compensatory sanctions to be directly linked or carefully calibrated to the sanctioned conduct. *See* Pet. at 11-13 (collecting authority); *see, e.g.*, *Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 808 (8th Cir. 2005) (overturning monetary sanction imposed under a court's inherent powers because it did not "relate[] *concretely* to costs . . . *directly incurred* because of [the sanctioned attorney's] actions") (emphasis added); *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 378 (4th Cir. 2004) (overturning civil sanctions because "the amounts of the fines were not determined by reference to any losses incurred by the [plaintiffs] as a result of [defendant's] alleged failure to complete discovery"). The majority's opinion conflicts irreconcilably with the authority of other Circuits enforcing a causation requirement.

Without any ability to contest the split, Plaintiffs pretend that the Ninth Circuit actually found causation and that the causation issue is "moot." But both of these points show no fidelity to what the Ninth Circuit actually held.

First, Plaintiffs assert that the Ninth Circuit found a causal link under *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), and that this causation finding comports with *Int'l Union v. Bagwell*, 512 U.S. 821 (1994). Judge Watford's dissent confirms that

Plaintiffs have mischaracterized a key aspect of the Ninth Circuit's ruling:

> The majority does not contend that a causal connection between Goodyear's misconduct and the fees awarded has been shown here, as required for the sanctions to be deemed compensatory. . . .
>
> [A] sanction can be deemed compensatory only if it compensates the injured party for losses sustained *as a result of* the sanctionable misconduct . . .
>
> [T]he fees awarded in this case were not sustained *as a result of* Goodyear's misconduct.

Pet. App. 46a-47a (emphasis in original). Judge Watford protested the majority's adoption of a "competing principle" (displacing the causation requirement) "that a fee award may be deemed compensatory even if the fees were *not* incurred as a result of the sanctionable misconduct, so long as the misconduct involves 'frequent and severe abuses of the judicial system.'" *Id.* at 47a (emphasis in original).

The majority itself, furthermore, expressly recognized that it was rejecting a direct causation requirement, defeating Plaintiffs' assertion that there is no split. Departing from prior cases, the court discarded the rule "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be *directly linked* to the bad faith conduct." *Id.* at 28a (majority op.) (emphasis added). The majority accordingly affirmed

the award to Plaintiffs of "all their attorneys' fees and costs in prosecuting the action" after the purported discovery misconduct without further scrutiny. *Id.* at 32a.

Plaintiffs defend this holding as consistent with *Chambers*, but their argument does not withstand scrutiny. First, unlike in this case, the fees in *Chambers* appear to have been incurred "as a direct result" of misconduct. *Id.* at 48a (Watford, J., dissenting). Second, "the Court in *Chambers* left no doubt that punishment was indeed a key purpose of the sanctions imposed in that case. . . . Because it was partly punitive, the sanctions award did not need to be limited to fees directly caused by Chambers' misconduct." *Id.* at 48a-49a. As Judge Watford explains, after *Chambers*, this Court in *Bagwell* held that such "punitive sanctions must be accompanied by the procedural protections applicable in criminal cases"—procedures which undisputedly were not followed here. *Id.* at 49a.

Indeed, the district court appreciated the difference: As Plaintiffs note, the district court set out an alternative award that could be issued in place of its $2.7 million award should the Ninth Circuit decide to follow the rule of direct causation. *Id.* at 180a, 185a. But the Ninth Circuit rejected that rule and affirmed the entire $2.7 million sanctions award rather than an alternative amount. *Id.* at 42a. As the alternative award was never adopted, Plaintiffs have no basis for insisting that the (theoretical) alternative award renders Goodyear's argument "moot." On the contrary, the alternative award illustrates the difference between the causation requirement and the path charted by the majority.

The legal issues have been properly framed by the majority and the dissent, and there is no dispute that the district court awarded far more in sanctions than if the causal connection rule applied. Given that the circuit split here is undisputed, this case presents an ideal vehicle to review this sanctions question, which carries significant repercussions for all parties accused of sanctionable conduct. This Court should accordingly accept *certiorari* to resolve this conflict by establishing clear standards for inherent authority sanctions.

II. Plaintiffs Do Not Defend The Ninth Circuit's Decision To Impose Attorneys' Fees As Sanctions Against A Client For The Conduct Of Its Attorneys.

Plaintiffs abandon the Ninth Circuit's holding that Goodyear can be sanctioned for the actions of its lawyers with attorneys' fees imposed under inherent powers. Disregarding the key predicate for the court's ruling, Plaintiffs fail to defend the Ninth Circuit's reliance on *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). *See* Pet. App. 26a (Ninth Cir. Op.) ("Goodyear 'is deemed bound by the acts of [its lawyers] and is considered to have notice of all facts, notice of which can be charged upon the attorney.'") (citing *Link*, 370 U.S. at 634). Refusing to cite *Link* in their opposition, Plaintiffs effectively concede Goodyear's argument in its Petition that the Ninth Circuit erroneous relied on *Link* to enable a party to be sanctioned for the alleged actions of its counsel. *See* Pet. at 18-20.

Rejecting the Ninth Circuit's primary basis for affirming sanctions against Goodyear, Plaintiffs concede that inherent authority sanctions must be based on an individualized bad-faith finding. *See*

Opp. at 16. But that was not the rule followed by the Ninth Circuit, which instead undercut that standard by enabling the alleged actions of counsel to satisfy the personalized bad-faith inquiry. As Goodyear explained in its Petition, that holding creates a circuit split with the Eleventh Circuit. *See, e.g.*, *Byrne v. Nezhat*, 261 F.3d 1075, 1123 (11th Cir. 2001) ("To support its findings of bad faith and otherwise sanctionable conduct, the court impermissibly relied solely on the actions of counsel.").

Instead of engaging on these points, Plaintiffs try to portray the matter as a purely factual affair, highlighting the Ninth Circuit's statement that "the district court did not abuse its discretion in concluding that Goodyear participated directly in the discovery fraud." Opp. at 17 (citing Pet. App. 27a). But as Goodyear explained in its Petition, the Ninth Circuit did not support its ruling with the specific grounds required to affirm a finding of individualized, subjective bad faith. Pet. at 22. Like the Ninth Circuit, Plaintiffs instead rely largely on the district court's conclusion that in-house counsel was generally responsible for approving discovery responses.

Plaintiffs contend that there is no conflict with the Eleventh Circuit's decision in *Byrne*, because the district court found that Goodyear was the "final decision maker" on discovery responses. Opp. at 17. Plaintiffs apparently miss the point of *Byrne*: the Eleventh Circuit vacated inherent authority sanctions imposed on a client for "the actions of counsel," 261 F.3d at 1123, deeming it insufficient that the client "relied on" counsel when making decisions in the litigation. *Id.* at 1125-26. The

Eleventh Circuit required record evidence that the client "*knew* that a baseless claim had been brought on her behalf or that she was pursuing the [other party] for a harassing or other impermissible purpose." *Id.* at 1124 (emphasis added). In this case, Goodyear presented evidence that in-house counsel relied on the advice of counsel when reviewing and approving discovery responses, and the lower courts made no findings to the contrary. The Ninth Circuit's ruling that this routine practice by in-house counsel warrants inherent authority sanctions stands in conflict with the principle recognized in *Byrne*.

Plaintiffs also attempt to distinguish *Byrne* on the grounds that the district court made other factual findings against Goodyear relating to its Rule 30(b)(6) witness. *Byrne* itself requires "other evidence in the record" from which to infer bad faith from a false or inconsistent deposition statement. 261 F.3d at 1125. Goodyear, moreover, specifically challenged on appeal the district court's factual conclusions as to Goodyear's conduct, refuting the court's findings regarding Goodyear's corporate representative, and exposing the paucity of the evidence of Goodyear's bad faith.

Notably, the Ninth Circuit affirmed this finding without substantively addressing any of Goodyear's counterarguments. Pet. App. at 25a. But the weight of authority in the Circuits demands "clear and convincing evidence" of individualized, subjective bad faith to impose inherent authority sanctions on a particular party. *See* Pet. at 23. In the face of Goodyear's arguments, the Ninth Circuit's perfunctory affirmance failed to faithfully apply the "clear and convincing evidence" requirement.

As this Court has recognized, inherent authority sanctions are largely "shielded from direct democratic controls," *Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980), and are not a rule-based mechanism for sanctions, *Chambers*, 501 U.S. at 50. That is all the more reason to tread cautiously in considering such sanctions, and exactly why courts have imposed the subjective bad faith requirement as well as the clear and convincing evidentiary standard. *See id.* ("A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees."). This Court should accept this case to reinforce those protections for all parties threatened with the prospects of inherent authority sanctions.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for a writ of *certiorari*.

Dated: June 30, 2016

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 15-1406

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 16, 2016
CERTIORARI GRANTED SEPTEMBER 29, 2016

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The following documents have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari:

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U.S. DISTRICT COURT
DISTRICT OF ARIZONA
(PHOENIX DIVISION)

Case #: 2:05-cv-02046-ROS

HAEGER *et al.*,

v.

GOODYEAR TIRE & RUBBER COMPANY *et al.*,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
07/11/2005	1	NOTICE OF REMOVAL from Maricopa County Superior Court, case number CV2005-050959 (Complaint), filed by Suzanne Haeger, Farmers Insurance Company of Arizona, Leroy Haeger, Donna Haeger, Barry Haeger.(JIR,) (Entered: 07/13/2005)
07/11/2005		SUMMONS Returned Executed by Leroy Haeger, Donna Haeger. Kenneth Brinker, statutory agent, served for Gulfstream Coach Inc served on 6/20/2005, answer due 7/11/2005. ***State Court record received 7/11/05, filed in state court on 6/29/05, docketed in U.S. District Court on 7/11/05*** (JIR,) (Entered: 07/13/2005)

DATE	NO.	DOCKET TEXT
08/23/2006	53	TRANSCRIPT of Discovery Dispute and Rule 16 Conference Proceedings held on 8/22/06 before Judge Roslyn O Silver. Court Reporter: David M Lee. (BAS,) (Entered: 08/23/2006)
08/28/2006	56	*Modified by (Doc. 1153) PROTECTIVE ORDER (re handling of confidential documents and confidential information). Signed by Judge Roslyn O Silver on 8/28/2006. (LAD) Modified on 6/28/2016 (EJA). (Entered: 08/28/2006)
12/28/2006	97	STATEMENT of Joint Statement of Discovery Dispute by Plaintiffs Suzanne Haeger, Farmers Insurance Company of Arizona, Leroy Haeger, Donna Haeger, Barry Haeger, Defendants Goodyear Tire & Rubber Company, Spartan Motors Inc, Gulfstream Coach Inc. (Kurtz, David) (Entered: 12/28/2006)
01/29/2007	116	TRANSCRIPT of Conference Proceedings held on 1/3/07 before Judge Roslyn O Silver. Court Reporter: Merilyn A Sanchez. (BAS,) (Entered: 01/29/2007)
04/17/2007	152	STATEMENT of Joint Statement Re: Discovery Dispute by Plaintiffs Suzanne Haeger, Leroy Haeger, Donna Haeger, Barry Haeger. (Kurtz, David) (Entered: 04/17/2007)

DATE	NO.	DOCKET TEXT
05/11/2007	175	AMENDED DOCUMENT by Suzanne Haeger, Leroy Haeger, Donna Haeger, Barry Haeger. *Plaintiffs' Amended Notice of Rule 30(b)(6) Deposition of Goodyear Tire and Rubber Company*. (Kurtz, David) (Entered: 05/11/2007)
05/22/2007	201	TRANSCRIPT of Discovery Dispute and Status Conference Proceedings held on 5/17/07 before Judge Roslyn O Silver. Court Reporter: Elaine Cropper. (BAS,) (Entered: 05/22/2007)
06/01/2007	225	Joint STATEMENT of Discovery Dispute by Plaintiffs Suzanne Haeger, Farmers Insurance Company of Arizona, Leroy Haeger, Donna Haeger, Barry Haeger, Defendant Goodyear Tire & Rubber Company. (Attachments: (1) Exhibit A (2) Exhibit B (3) Exhibit C (4) Exhibit D)(SAT) (Entered: 06/01/2007)
10/15/2007	345	STATEMENT of Joint Statement Regarding Oustanding Discovery Issues per 9/28/07 Status Conference by Plaintiffs Suzanne Haeger, Leroy Haeger, Donna Haeger, Barry Haeger. (O'Connor, Michael) (Entered: 10/15/2007)

DATE	NO.	DOCKET TEXT
03/29/2010	894	NOTICE of Settlement by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Leroy Haeger, Suzanne Haeger (Kurtz, David) (Entered: 03/29/2010)
04/14/2010	926	Minute Entry. Proceedings held before Judge Roslyn O Silver: This is the time set for a Jury Trial on 4/14/2010. The parties inform the Court they have reached a settlement. The Clerk of Court is directed to close the case. ORDERED that all pending motions to unseal documents from the Plaintiffsare withdrawn. Court Adjourned. (Court Reporter Elaine Cropper.) (MAP) (Entered: 04/15/2010)
06/30/2010	936	SEALED MOTION by Plaintiffs (Attachments: # 1 Exhibit 1 - 4)(MAP) (Entered: 06/30/2010)
05/31/2011	938	MOTION for Sanctions *FOR DISCOVERY FRAUD* by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (Attachments: # 1 Exhibit 1 - 13)(Kurtz, David) (Entered: 05/31/2011)

DATE	NO.	DOCKET TEXT
06/23/2011	945	* MOTION (REQUEST) FOR ORAL ARGUMENT ON PLAINTIFFS' MOTION FOR SANCTIONS FOR DISCOVERY FRAUD [DOC. 938] by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Suzanne Haeger. (Attachments: # 1 Text of Proposed Order)(Kurtz, David) Modified on 6/23/2011 (LAD). * Incorrect event selected. Docket text modified from Request to Motion. (Entered: 06/23/2011)
07/15/2011	948	RESPONSE in Opposition re 938 MOTION for Sanctions *FOR DISCOVERY FRAUD* filed by Goodyear Tire & Rubber Company. (Attachments: # 1 Exhibit Exhibits to Goodyear Tire's Memorandum in Opposition)(Hancock, Graeme) (Entered: 07/15/2011)
07/18/2011	949	* MOTION to Compel Goodyear to Disclose Concealed Test Data by Barry Haeger. (Kurtz, David) Modified on 7/19/2011 (LAD). * Document not in compliance with LRCiv 7.1(c). Attorney noticed. (Entered: 07/18/2011)
07/22/2011	951	RESPONSE in Opposition re 949 MOTION to Compel Goodyear to Disclose Concealed Test Data filed by Goodyear Tire & Rubber Company. (Okun, Jill) (Entered: 07/22/2011)

DATE	NO.	DOCKET TEXT
07/26/2011	952	REPLY to Response to Motion re 949 MOTION to Compel Goodyear to Disclose Concealed Test Data filed by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (Kurtz, David) (Entered: 07/26/2011)
10/05/2011	954	ORDER - IT IS ORDERED no later than October 7, 2011 Defendant shall produce to Plaintiffs, and file on the docket, the test results at issue. IT IS FURTHER ORDERED the Motion to Compel (Doc. 949) is DENIED AS MOOT. (See document for details). Signed by Chief Judge Roslyn O Silver on 10/4/11.(LAD) (Entered: 10/05/2011)
10/06/2011	955	MOTION to Seal Document by Goodyear Tire & Rubber Company. (Attachments: # 1 Exhibit A - Declaration of James C. Stroble) (Okun, Jill) (Entered: 10/06/2011)
10/07/2011	959	Sealed Document for In Camera Review filed by Goodyear Tire & Rubber Company. (MAP) (Entered: 10/07/2011)

DATE	NO.	DOCKET TEXT
10/17/2011	963	SEALED REPLY to Response to Motion re 938 MOTION filed by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (Attachments: # 1 Exhibit 1-12)(MAP) (Entered: 10/17/2011)
10/24/2011	964	RESPONSE to Motion re 945 MOTION (REQUEST) for Oral Argument on Plaintiffs' Motion for Sanctions for DIscovery Fraud filed by Goodyear Tire & Rubber Company. (Attachments: # 1 Exhibit 1 - Declaration of James C. Stroble, # 2 Exhibit Exhibit A to Stroble Declaration (Part 1 of 3), # 3 Exhibit Exhibit A to Stroble Declaration (Part 2 of 3), # 4 Exhibit Exhibit A to Stroble Declaration (Part 3 of 3))(Okun, Jill) (Entered: 10/24/2011)
10/26/2011	965	*REPLY to Re[illegible]nse to Motion re 945 MOTIO[illegible]EQUEST) FOR ORAL ARGU[illegible]T ON PLAINTIFFS' MOTION [illegible]OR SANCTIONS FOR DISCOVERY FRAUD [DOC. 938] by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Suzanne Haeger. (Attachments: # 1 Text of Proposed Order)(Kurtz, David) *Incorrect event type selected; entry modified on 10/27/2011. (KMG). (Entered: 10/26/2011)

DATE	NO.	DOCKET TEXT
02/22/2012	969	IT IS ORDERED granting Plaintiffs' Motion for Oral Argument [Doc. 945]. Oral argument on Plaintiffs' Motion for Sanctions for Discovery Fraud [Doc. 938] is set for 2/29/2012 at 2:00 PM in Courtroom 604, 401 West Washington Street, Phoenix, AZ 85003, before Chief Judge Roslyn O. Silver. Ordered by Chief Judge Roslyn O. Silver.(ROS)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 02/22/2012)
02/24/2012	970	ORDER - IT IS ORDERED no later than noon on February 28, 2012, Goodyear and its counsel shall file either joint or separate briefs of no more than ten pages each addressing the Court's proposed findings of fact and conclusions of law. Signed by Chief Judge Roslyn O Silver on 2/24/12. (Attachments: # 1 Proposed Order)(LAD) (Entered: 02/24/2012)
03/09/2012	980	RESPONSE re 970 Order, *"Separate Response of Fennemore Craig and Graeme Hancock"* by Movant Fennemore Craig PC, Interested Party Graeme Hancock. (Attachments: # 1 Index, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D)(Coulter, Lisa) (Entered: 03/09/2012)

DATE	NO.	DOCKET TEXT
03/09/2012	983	RESPONSE re 970 Order, *Response on Behalf of Roetzel & Andress, LPA to Court's February 24, 2012 Proposed Order* by Movant Roetzel & Andress. (Attachments: # 1 Exhibit Exhibit A to Response on Behalf of Roetzel & Andress to Court's February 24, 2012 Proposed Order)(Harrison, Mark) (Entered: 03/09/2012)
03/09/2012	984	RESPONSE re 977 Order on Motion for Extension of Time to File Response/Reply,,, *The Goodyear Tire & Rubber Companys Response to the Courts February 24, 2012 Proposed Order* by Defendant Goodyear Tire & Rubber Company. (Attachments: # 1 Exhibit Index and Exhibits A - G)(McQuaid, Brian) (Entered: 03/09/2012)
03/13/2012	987	ORDER - IT IS ORDERED the hearing on Plaintiffs' Motion for Sanctions for Discovery Fraud set March 13, 2012 is VACATED AND RESET for March 22, 2012 at 10:00 a.m. IT IS FURTHER ORDERED the Motion for Leave to File a Combined Response (Doc. 986) is GRANTED. Plaintiffs shall file their combined response no later than March 13, 2012. IT IS FURTHER ORDERED the Motion to Seal (Doc. 981) is GRANTED. IT IS FURTHER

DATE	NO.	DOCKET TEXT
		ORDERED no later than March 16, 2012 Defendants shall file responses of no more than five pages each. The Clerk shall file under seal the document lodged at Doc. 982. Signed by Chief Judge Roslyn O Silver on 3/13/12. (LAD) (Entered: 03/13/2012)
03/13/2012	988	Sealed Declaration filed by Goodyear Tire & Rubber Company. (LAD) (Entered: 03/13/2012)
03/13/2012	989	NOTICE re The Goodyear Tire & Rubber Company's Notice of Correction by Goodyear Tire & Rubber Company . (McQuaid, Brian) (Entered: 03/13/2012)
03/13/2012	991	SEALED LODGED Proposed (reports and chart) re: 990 MOTION to Seal Document *The Goodyear Tire & Rubber Companys Motion to File Additional Documents Under Seal*. Document to be filed by Clerk if Motion to Seal is granted. Filed by Goodyear Tire & Rubber Company. (McQuaid, Brian) (Entered: 03/13/2012)
03/13/2012	992	RESPONSE re 983 Response, 980 Response, 984 Response, (*Plaintiffs' Combined Response to Goodyear Tire & Rubber Company, Roetzel & Andress and Fennemore Craig's Responses to the Court's Proposed Order*) by Plaintiffs Barry Haeger,

DATE	NO.	DOCKET TEXT
		Donna Haeger, Donna Haeger, Suzanne Haeger. (Attachments: # 1 Exhibit 1 to 13)(Kurtz, David) (Entered: 03/13/2012)
03/14/2012	995	ORDER re 3/16/2012 briefing. Signed by Chief Judge Roslyn O. Silver on 3/14/2012. (ROS) (Entered: 03/14/2012)
03/16/2012	999	REPLY re 992 Response, *Fennemore Craig and Graeme Hancock's Reply in Support of their Separate Response* by Movants Fennemore Craig PC, Graeme Hancock. (Coulter, Lisa) (Entered: 03/16/2012)
03/16/2012	1000	RESPONSE re 992 Response, 995 Order *Response on Behalf of Roetzel & Andress LPA to Court's March 14, 2012 Order* by Movant Roetzel & Andress. (Attachments: # 1 Exhibit Exhibit 1 to Response on Behalf of Roetzel & Andress, LPA to Court's March 14, 2012 Order, # 2 Exhibit Exhibit 2 to Response on Behalf of Roetzel & Andress, LPA to Court's March 14, 2012 Order)(Harrison, Mark) (Entered: 03/16/2012)
03/16/2012	1001	REPLY re 995 Order *The Goodyear Tire & Rubber Companys Reply In Support Of Its Response to the Courts Proposed Order and Response to the Courts March 14, 2012 Order* by Defendant Goodyear

DATE	NO.	DOCKET TEXT
		Tire & Rubber Company. (Attachments: # 1 Exhibit Index and Exhibits A - E)(McQuaid, Brian) (Entered: 03/16/2012)
03/20/2012	1003	REPLY re 1000 Response, 999 Reply, 1001 Reply, by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Suzanne Haeger. (Kurtz, David) (Entered: 03/20/2012)
03/21/2012	1004	ORDER - IT IS ORDERED no later than 5:00 p.m. on March 21, 2012 the parties shall file a joint statement identifying the individuals who will testify at the March 22, 2012 hearing. The statement should identify the planned scope of each individual's testimony. Signed by Chief Judge Roslyn O Silver on 3/21/12. (LAD) (Entered: 03/21/2012)
03/30/2012	1014	NOTICE OF FILING OF OFFICIAL PARTIAL TRANSCRIPT of Motion Hearing - Unsealed Portion. Proceedings held on 3/22/2012, before Judge Roslyn O. Silver. Court Reporter Elaine Cropper. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 4/20/2012. Redacted Transcript

DATE	NO.	DOCKET TEXT
		Deadline set for 4/30/2012. Release of Transcript Restriction set for 6/28/2012. (VAR) (Entered: 03/30/2012)
04/03/2012	1015	MOTION for Discovery *Motion Pursuant to Rule 502(D), Federal Rules of Evidence, For An Order Regarding Goodyears Attorney / Client Privilege and Work Product Protection* by Goodyear Tire & Rubber Company. (Attachments: # 1 Text of Proposed Order)(McQuaid, Brian) (Entered: 04/03/2012)
04/03/2012	1017	ORDER denying 1015 Motion for Discovery and denying 1016 Motion to Expedite. Signed by Chief Judge Roslyn O Silver on 4/3/12.(LSP) (Entered: 04/03/2012)
04/06/2012	1018	*JOINT STATEMENT of Parties' Joint Statement of Discovery Dispute by Defendant Goodyear Tire & Rubber Company, Bary Haeger, Donna Haeger, Suzanne Haeger, Spartan Motors Incorporated. (Attachments: # 1 Exhibit Index and Exhibit A-C)(McQuaid, Brian) * Modified to add additional filers on 4/9/2012 (LAD). (Entered: 04/06/2012)

DATE	NO.	DOCKET TEXT
04/10/2012	1020	ORDER - IT IS ORDERED Goodyear must produce the documents requested by Plaintiffs as set forth above. The Court will determine the privilege issue at a later date. (See document for full details). Signed by Chief Judge Roslyn O Silver on 4/10/12. (LAD) (Entered: 04/10/2012)
04/18/2012	1023	STATEMENT of PARTIES' JOINT STATEMENT OF DISCOVERY DISPUTE by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Suzanne Haeger. (Kurtz, David) (Entered: 04/18/2012)
04/24/2012	1025	ORDER re 1023 Statement: The present dispute is whether the Court meant to require Goodyear conduct specific searches or whether the Court meant to require Goodyear to respond to the actual Request for Production beginning as of the year 2000. Considering the difficulty in the past regarding Goodyear's compliance with discovery requests, Goodyear must respond to the actual Request for Production of Documents. That request, however, must be limited to documents from the year 2000 to the present, and the test data communications must involve the G159 tire. According to Goodyear, this production will take a substantial amount of time and

DATE	NO.	DOCKET TEXT
		effort. The parties should attempt to agree upon a date for the production of all responsive documents. The deposition of Ms. Okey, which must occur in Phoenix, can be scheduled after that date. If absolutely necessary, the parties may request the Court reset the briefing dates. Signed by Chief Judge Roslyn O Silver on 4/23/12. (LAD) (Entered: 04/24/2012)
05/18/2012	1028	ORDER pursuant to 1026 Stipulation: IT IS ORDERED the briefing schedule set forth in Doc. 1009 is revised as follows: The deposition of Ms. Okey is to be completed in Phoenix by June 8, 2012; simultaneous opening briefs are due June 20, 2012; and simultaneous response briefs are due July 3, 2012. Signed by Chief Judge Roslyn O Silver on 5/18/12. (LAD) (Entered: 05/18/2012)
06/15/2012	1029	TEXT ONLY ORDER - The parties' opening and response briefs shall be no more than twenty-two pages each. Plaintiffs may file separate responses or a single response of forty pages. Ordered by Chief Judge Roslyn O. Silver on 6/15/2012. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (CLB) (Entered: 06/15/2012)

DATE	NO.	DOCKET TEXT
06/22/2012	1043	Sealed Opening Brief filed by Fennemore Craig PC, Graeme Hancock. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C-F)(MAP) (Entered: 06/22/2012)
06/22/2012	1044	Sealed Supplemental Brief in Opposition re 938 filed by Goodyear Tire & Rubber Company. (Attachments: # 1 Exhibit A-B, # 2 Exhibit C-L)(MAP) (Entered: 06/22/2012)
06/22/2012	1045	Sealed Post-Hearing Opening Brief filed by Roetzel & Andress. (Attachments: # 1 Exhibit)(MAP) (Entered: 06/22/2012)
06/22/2012	1046	Sealed Supplemental Brief re 938 filed by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (MAP) (Entered: 06/22/2012)
06/22/2012	1047	Sealed Statement of Facts re 1046 filed by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (Attachments: # 1 Exhibit 1-25, # 2 Exhibit 26-50)(MAP) (Entered: 06/22/2012)
07/09/2012	1064	Sealed Closing Brief filed by Roetzel & Andress. (Attachments: # 1 Exhibit A)(MAP) (Entered: 07/09/2012)

DATE	NO.	DOCKET TEXT
07/09/2012	1065	Sealed Response Brief filed by Fennemore Craig PC, Graeme Hancock. (Attachments: # 1 Index, # 2 Exhibit A)(MAP) (Entered: 07/09/2012)
07/09/2012	1067	Sealed Closing Brief filed by Goodyear Tire & Rubber Company. (MAP) (Entered: 07/09/2012)
07/09/2012	1068	Sealed Statement of Facts filed by Goodyear Tire & Rubber Company. (Attachments: # 1 Index and Exhibit A-1, # 2 Exhibit A-2, # 3 Exhibit A-3, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D - F)(MAP) (Entered: 07/09/2012)
07/09/2012	1069	SEALED COMBINED RESPONSE BRIEF filed by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (Attachments: # 1 Exhibit 1 - 8) (MAP) (Entered: 07/09/2012)
07/09/2012	1070	Sealed Errata filed by Barry Haeger, Donna Haeger(wife), Donna Haeger(as the personal representative of the estate of Leroy Haeger), Suzanne Haeger. (Attachments: # 1 Exhibit 31)(MAP) (Entered: 07/09/2012)
08/17/2012	1072	NOTICE of Errata re 1047 Sealed Document by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Leroy Haeger, Suzanne Haeger.

DATE	NO.	DOCKET TEXT
		(Attachments: # 1 Exhibit)(Egbert, John) (Entered: 08/17/2012)
11/08/2012	1073	ORDER granting in part Plaintiffs' 938 Motion for Sanctions. IT IS FURTHER ORDERED denying Defendant Goodyear's 1034 Motion for Hearing. IT IS FURTHER ORDERED no later than 12/14/2012 Plaintiffs shall file their application for attorneys' fees as required by Local Rule. Signed by Chief Judge Roslyn O Silver on 11/8/12.(CLB) (Entered: 11/08/2012)
12/07/2012	1080	*NOTICE OF APPEAL to 9th Circuit, re: 1073 Order by Goodyear Tire & Rubber Company. Filing fee received: $ 455.00, receipt number 0970-7539511. (McQuaid, Brian) *Modified to add document number/link on 12/10/2012* (REW). (Entered: 12/07/2012)
12/13/2012	1082	* MOTION (APPLICATION) for Attorneys' Fees and Costs with Supporting Declarations by Plaintiffs Barry Haeger, Donna Haeger, Suzanne Haeger. (Attachments: # 1 Exhibit Index and EX 1, # 2 Exhibit Exhibit A, # 3 Exhibit Exhibit B, # 4 Exhibit Exhibit C, # 5 Exhibit EX 2, # 6 Exhibit EX 3, 4, 5, 6)(Kurtz, David) * Modified to correct event on 12/14/2012 (LAD). (Entered: 12/13/2012)

DATE	NO.	DOCKET TEXT
01/10/2013	1100	OBJECTION *Joint Exhibit in Support of Parties' Separately Filed Objections to Plaintiffs' Application for Attorneys' Fees and Costs with Supporting Declarations* by Movants Fennemore Craig PC, Graeme Hancock. (Attachments: # 1 Exhibit A 1 of 2, # 2 Exhibit A 2 of 2, # 3 Exhibit B, # 4 Exhibit C)(Coulter, Lisa) (Entered: 01/10/2013)
01/10/2013	1101	* RESPONSE to 1082 MOTION (APPLICATION) for Attorney Fees and Costs, 1100 Objection, by Movant Basil J Musnuff. (Molinar, Jeffrey) * Modified to correct event on 1/11/2013 (LAD). (Entered: 01/10/2013)
01/10/2013	1102	* RESPONSE to Motion re 1100 Objection, Fennemore Craig, P.C.'s and Graeme Hancock's Response and Objections to Plaintiffs' December 13, 2012 Fee Application 1082 by Movant Fennemore Craig PC. (Coulter, Lisa) * Modified to correct event on 1/11/2013 (LAD). (Entered: 01/10/2013)
01/10/2013	1103	RESPONSE to Motion re 1082 MOTION (APPLICATION) for Attorney Fees and Costs (*related to ECF 1100 Objection*) filed by Goodyear Tire & Rubber Company. (Okun, Jill) (Entered: 01/10/2013)

DATE	NO.	DOCKET TEXT
01/29/2013	1112	* REPLY to Response to 1082 MOTION (APPLICATION) for Attorney Fees and Costs by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Suzanne Haeger. (Attachments: # 1 Exhibit 1 and 2, # 2 Exhibit 3 - Part 1, # 3 Exhibit 3 Part 2, # 4 Exhibit 3 Part 3, # 5 Exhibit 3 Part 4, # 6 Exhibit 3 Part 5, # 7 Exhibit 3 Part 6)(Kurtz, David) * Modified to correct event on 1/30/2013 (LAD). (Entered: 01/29/2013)
06/26/2013	1121	ORDER - IT IS ORDERED the Motion for Attorney Fees and Costs (Doc. 1082) is GRANTED IN PART as set forth above. IT IS FURTHER ORDERED no later than July 19, 2013 the interested parties shall meet and confer regarding the appropriate amount of attorneys' fees and costs. If they are able to reach agreement, no later than July 22, 2013 the parties shall file a joint statement identifying the appropriate amount of attorneys' fees and costs incurred after September 2006 as well as the attorneys' fees and costs incurred as a direct result of the sanctionable conduct. IT IS FURTHER ORDERED if the parties cannot agree on the appropriate amount of attorneys' fees and costs, no later than July 26,

DATE	NO.	DOCKET TEXT
		2013 they shall file a joint statement of no more than three pages per party with each party setting forth: whether appointment of a special master is warranted and how the costs of the special master should be allocated. The parties should also jointly identify three individuals qualified to serve. IT IS FURTHER ORDERED the Motion for Clarification (Doc. 1089) is GRANTED. IT IS FURTHER ORDERED the Motion for Clarification (Doc. 1114) is DENIED WITHOUT PREJUDICE. Plaintiffs should renew their request, if appropriate, within ten days of the mandate being issued. (See document for full details). Signed by Chief Judge Roslyn O Silver on 6/26/13. (LAD) (Entered: 06/26/2013)
07/26/2013	1122	STATEMENT of JOINT RESPONSE RE WHETHER A SPECIAL MASTER SHOULD BE APPOINTED; COST ALLOCATION; AND POTENTIAL SPECIAL MASTERS re 1121 Order on Motion for Attorney Fees,,,,,,, Order on Motion for Miscellaneous Relief,,,,,,,,,,, by Plaintiffs Barry Haeger, Donna Haeger, Donna Haeger, Suzanne Haeger. (Kurtz, David) (Entered: 07/26/2013)

DATE	NO.	DOCKET TEXT
08/26/2013	1125	ORDER - IT IS ORDERED the Clerk of Court is directed to enter judgment in favor Plaintiffs and against Graeme Hancock in the amount of $548,240.23 and against Basil J. Musnuff and the Goodyear Tire and Rubber Co. in the amount of $2,192,960.93. (See document for further details). Signed by Chief Judge Roslyn O Silver on 8/26/13. (LAD) (Entered: 08/26/2013)
08/26/2013	1126	JUDGMENT ON ATTORNEYS' FEES. IT IS ORDERED AND ADJUDGED Pursuant to the Order filed August 26, 2013, judgment is entered in favor of Plaintiffs and against Graeme Hancock in the amount of $548,240.23 and against Basil J. Musnuff and the Goodyear Tire and Rubber Company in the amount of $2,192,960.93. (LAD) (Entered: 08/26/2013)
09/06/2013	1127	NOTICE OF APPEAL to 9th Circuit Court of Appeals re: 1020 Order, 954 Order on Motion to Compel, 1126 Judgment on Attorney Fees, 1025 Order, 1073 Order on Motion for Sanctions, Order on Motion for Hearing on Motion, 1125 Order, by Goodyear Tire & Rubber Company. Filing fee received: $ 455.00, receipt number 0970-9587452. (Okun, Jill) (Entered: 09/06/2013)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket #: 12-17718

LEROY HAEGER, *et al.*,

v.

THE GOODYEAR TIRE & RUBBER CO, *et al.*,

RELEVANT DOCKET ENTRIES

DATE	NO.	DOCKET TEXT
12/11/2012	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 12/18/2012. Transcript ordered by 01/07/2013. Transcript due 02/05/2013. Appellant The Goodyear Tire & Rubber Company opening brief due 03/18/2013. Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger answering brief due 04/16/2013. Appellant's optional reply brief is due 14 days after service of the answering brief. [8433837] (RT) [Entered: 12/11/2012 12:42 PM]

DATE	NO.	DOCKET TEXT
02/26/2013	14	Filed order (ALFRED T. GOODWIN, SUSAN P. GRABER and KIM MCLANE WARDLAW) The court has reviewed the responses to the order to show cause. On November 8, 2012, the district court entered an order granting in part a motion for sanctions. In the November 8, 2012 order, the district court, inter alia, granted sanctions to be imposed on appellant Goodyear Tire & Rubber Company and directed appellees to file additional documentation establishing the amount of attorneys' fees and costs. To date, no amount of monetary sanctions has been determined. Consequently, the portion of the November 8, 2012 order regarding the imposition of monetary sanctions is not final or appealable. See 28 U.S.C. § 1291; Jensen Elec. Co. v. Moore, Caldwell, Rowland & Dodd, Inc., 873 F.2d 1327, 1329 (9th Cir. 1989) (order awarding sanctions is not appealable until the amount of sanctions is determined). Accordingly, the scope of this appeal is limited to review only of the portion of the November 8, 2012 order imposing non-monetary sanctions on appellant Goodyear Tire & Rubber Company and requiring appellant to "file a copy of this Order in any G159 case initiated after the date of this

DATE	NO.	DOCKET TEXT
		Order." The court denies appellant's request that this court exercise pendant appellate jurisdiction over the monetary sanctions portion of the November 8, 2012 order. In addition to all other issues that the parties may wish to raise in the merits briefs, the parties shall address whether this court has jurisdiction to review the portion of the November 8, 2012 order imposing non-monetary sanctions on appellant. The opening brief and excerpts of record are due April 1, 2013; the answering brief is due May 1, 2013; and the optional reply brief is due within 14 days after service of the answering brief. [8527506] (WL) [Entered: 02/26/2013 02:25 PM]
05/06/2013	22	Filed (UNDER SEAI) original and 7 copies of Appellant The Goodyear Tire & Rubber Company (Informal: No) opening brief of 59 pages. Four copies Excerpts of record in 7 volumes. Volumes 6 & 7 UNDER SEAL. Served on 05/01/2013. [8617155] (WWP) [Entered: 05/06/2013 11:59 AM]
07/02/2013	39	Filed (UNDER SEAL) original and 7 copies of Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger answering brief of 62 pages. Supplemental Excerpts of

DATE	NO.	DOCKET TEXT
		record in 4 volumes total. Volume 1 and 2 (dkt entry #33). Volumes 3 and 4 filed Under Seal. Served on 07/01/2013. [8700935] (WWP) [Entered: 07/12/2013 08:55 AM]
08/15/2013	41	Filed (UNDER SEAL) original and 7 copies of Appellant The Goodyear Tire & Rubber Company (Informal: No) reply brief of 29 pages. Served on 08/14/2013. [8752121] (WWP) [Entered: 08/22/2013 08:21 AM]
09/09/2013	42	Filed (ECF) Appellant The Goodyear Tire & Rubber Company and Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger Correspondence: Joint Notice of Entry of Final Judgment. Date of service: 09/09/2013 [8774321] (Egbert, John) [Entered: 09/09/2013 01:35 PM]
11/19/2013	49	Filed clerk order (Deputy Clerk: GS): The opposed motions to consolidate Nos. 12-17718, 13-16801, 13-16861, and 13-16862 are granted. Briefing is complete in No. 12-17718. The following briefing schedule shall govern the remaining consolidated cases. The opening briefs are due December 16, 2013. The answering brief is due January 15, 2014. The optional reply briefs are due within 14 days after service of the answering brief. The parties are

DATE	NO.	DOCKET TEXT
		reminded of the court's preference for a joint brief. See 9th Cir. R. 28-4 (In a consolidated case involving multiple separately represented appellants or appellees, all parties on a side are encouraged to join in a single brief to the greatest extent practicable). The provisions of the Streamlined Requests for Extensions of Time shall not apply to these consolidated cases. [8868910] [12-17718, 13-16801, 13-16861, 13-16862] (AF) [Entered: 11/19/2013 02:36 PM]
12/17/2013	53	Filed clerk order: The opening brief [50] submitted by The Goodyear Tire & Rubber Company is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [51] submitted by The Goodyear Tire & Rubber Company. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover.

DATE	NO.	DOCKET TEXT
		The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [8903972] [12-17718, 13-16801, 13-16861, 13-16862] (WWP) [Entered: 12/17/2013 07:57 AM]
03/26/2014	75	Filed (UNDER SEAL) original and 7 copies of Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger answering brief of 122 pages. Supplemental Excerpts of record in 1 volume. Volume VI. Served on 02/24/2014. [9034650] [12-17718, 13-16801, 13-16861, 13-16862] (WWP) [Entered: 03/27/2014 03:30 PM]
04/02/2014	76	Filed Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger paper copies of excerpts of record [67] in 1 volume. Volume 5. [9041590] [13-16801, 12-17718, 13-16861, 13-16862] (WWP) [Entered: 04/02/2014 01:47 PM]
04/02/2014	77	Filed (UNDER SEAL) Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger paper copies of excerpts of record in 1 volume. Volume 6. [9041597] [13-16801, 12-17718, 13-16861, 13-16862] (WWP) [Entered: 04/02/2014 01:50 PM]

DATE	NO.	DOCKET TEXT
04/16/2014	79	Filed clerk order: The reply brief [78] submitted by The Goodyear Tire & Rubber Company is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9060575] [12-17718, 13-16801, 13-16861, 13-16862] (WWP) [Entered: 04/16/2014 01:21 PM]
12/29/2014	101	Notice of Oral Argument on Tuesday, March 10, 2015 - 09:00 A.M. - Courtroom 3 - James R Browning US Cthse, 95 7th St, San Francisco, CA. View the Oral Argument Calendar for your case here. When you have reviewed the calendar, download the ACKNOWLEDGMENT OF HEARING NOTICE form, complete the form, and file it via Appellate ECF or return the completed form to: SAN FRANCISCO Office.

DATE	NO.	DOCKET TEXT
		[9364113] [12-17718, 13-16801, 13-16861, 13-16862] (AW) [Entered: 12/29/2014 02:37 PM]
02/25/2015	109	Filed (ECF) Appellant The Goodyear Tire & Rubber Company in 12-17718, 13-16801 citation of supplemental authorities. Date of service: 02/25/2014. [9434595] [12-17718, 13-16801, 13-16861, 13-16862] (Bergeron, Pierre) [Entered: 02/25/2015 01:31 PM]
03/03/2015	112	Filed (ECF) Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger in 12-17718, 13-16801, 13-16861, 13-16862 citation of supplemental authorities. Date of service: 03/03/2015. [9443319] [12-17718, 13-16801, 13-16861, 13-16862] (Egbert, John) [Entered: 03/03/2015 03:02 PM]
03/10/2015	113	ARGUED AND SUBMITTED TO J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD. [9452001] [12-17718, 13-16801, 13-16861, 13-16862] (TG) [Entered: 03/10/2015 02:12 PM]
07/20/2015	114	FILED OPINION (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD) AFFIRMED. The Sanctionees shall bear all costs in this appeal. Judge: MDS Authoring, Judge: PJW

DATE	NO.	DOCKET TEXT
		Dissenting. FILED AND ENTERED JUDGMENT. [9615023] [12-17718, 13-16801, 13-16861, 13-16862] (MM) [Entered: 07/20/2015 09:59 AM]
08/14/2015	120	Filed (ECF) Appellant GT in 12-17718, 13-16801, - GT in 13-16861, 13-16862 petition for rehearing en banc (from 07/20/2015 opinion). Date of service: 08/14/2015. [9647346] [12-17718, 13-16801, 13-16861, 13-16862] (Bergeron, Pierre) [Entered: 08/14/2015 10:35 AM]
09/17/2015	124	Filed order (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD): Appellees are directed to file a response to the Petitions for Rehearing En Banc of Appellant Goodyear Tire & Rubber Company, Appellant Basil J. Musnuff, and Appellants Graeme Hancock and Fennemore Craig P.C., filed with this court on August 14, 2015, and August 17, 2015. The response shall not exceed 15 pages or 4200 words, and shall be filed within 21 days of the filed date of this order. Parties who are registered for Appellate ECF must file the response electronically without submission of paper copies. Parties who are not registered Appellate ECF filers must file the original response plus 50 paper copies.

DATE	NO.	DOCKET TEXT
		[9687318] [12-17718, 13-16801, 13-16861, 13-16862] (AF) [Entered: 09/17/2015 03:35 PM]
10/07/2015	126	Filed (ECF) Appellees Barry Haeger, Donna Haeger, Leroy Haeger and Suzanne Haeger in 12-17718, 13-16801, 13-16861, 13-16862 response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges), Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges), Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing) for rehearing by en banc only (all active, any interested senior judges). Date of service: 10/07/2015. [9711043]. [12-17718, 13-16801, 13-16861, 13-16862] (Egbert, John) [Entered: 10/07/2015 05:37 PM]
02/16/2016	127	Filed order and amended opinion (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD). Amending Disposition Opinion AFFIRMED; The opinion and dissent filed on July 20, 2015 and published at 793 F.3d 1122 are hereby amended. The amended

DATE	NO.	DOCKET TEXT
		opinion and dissent are filed concurrently with this order. With these amendments, Judge M. Smith voted to deny the petitions for rehearing en banc, and Judge Wallace so recommends. Judge Watford voted to grant the petitions. The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petitions for rehearing en banc are DENIED. Future petitions for panel rehearing and petitions for rehearing en banc will not be entertained.. The Sanctionees shall bear all costs in this appeal. [9865156] [12-17718, 13-16801, 13-16861, 13-16862] (MM) [Entered: 02/16/2016 09:04 AM]
03/09/2016	132	Filed order (J. CLIFFORD WALLACE, MILAN D. SMITH, JR. and PAUL J. WATFORD) Appellants Goodyear Tire & Rubber Company, Basil J. Musnuff, Graeme Hancock, and Fennemore Craig, P.C. each filed a motion to stay the issuance of the mandate pending application for writ of certiorari. Fed. R. App. 41(d)(2). The motions are GRANTED.

DATE	NO.	DOCKET TEXT
		The mandate is stayed for ninety (90) days from the date of this order, pending Appellants' filing of a petition for writ of certiorari in the Supreme Court. If such a petition is filed, the stay shall continue until final disposition by the Supreme Court. Judge Wallace dissents, and votes to deny the motion to stay the issuance of the mandate. [9895101] [12-17718, 13-16801, 13-16861, 13-16862] (WL) [Entered: 03/09/2016 10:05 AM]
05/24/2016	135	Received notice from the Supreme Court: petition for certiorari filed on 05/16/2016. Supreme Court Number 15-1406. [9988485] [12-17718, 13-16801, 13-16861, 13-16862] (RR) [Entered: 05/24/2016 10:07 AM]
09/27/2016	137	Transmitted to the U.S. Supreme Court: CD of sealed 9th Circuit Documents. U.S. Supreme Court Case Number: 15-1398 + 15-1460. Tracking Information: FedEx 943607236299. [10139096] [12-17718, 13-16801, 13-16861, 13-16862] (SOS) [Entered: 09/27/2016 01:41 PM]
10/11/2016	138	Received notice from the Supreme Court. Petition for certiorari GRANTED on 09/29/2016. The petition for a writ of certiorari is granted limited to Question 1

DATE	NO.	DOCKET TEXT
		presented by the petition. The petition for a writ of certiorari in No. 15-1491 is granted limited to Question 1 presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument. Supreme Court Number 15-1406. [10154224] [12-17718, 13-16801, 13-16861, 13-16862] (RR) [Entered: 10/10/2016 10:42 AM]

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

[Filed June 10, 2005]

No. CV2005-050959

LEROY and DONNA HAEGER, husband and wife;
BARRY and SUZANNE HAEGER, husband and wife;
FARMERS INSURANCE COMPANY OF ARIZONA,
an Arizona corporation,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER COMPANY,
an Ohio corporation; SPARTAN MOTORS, INC., a
Michigan corporation; and GULFSTREAM COACH, INC.,
an Indiana corporation,

Defendants.

COMPLAINT

(Tort—Non-Motor Vehicle)

GENERAL ALLEGATIONS

1. Leroy and Donna Haeger, husband and wife, are residents of the State of New Mexico.

2. Barry and Suzanne Haeger, husband and wife, are residents of the State of Arizona.

3. Farmers Insurance Company of Arizona is an Arizona corporation with its principal place of business in Maricopa County, Arizona.

4. Defendants are foreign corporations doing business in Maricopa County Arizona, and which have otherwise manufactured and/or sold products which have been placed in the stream of commerce and which have caused damages to Plaintiffs in amounts in excess of the jurisdictional limits of this Court.

5. Defendants Goodyear, Spartan and Gulfstream each contributed in various ways to the manufacture, production, design, sale and warnings associated with a motorhome which was involved in an accident which caused serious injuries to Plaintiffs.

6. Defendant Goodyear Tire & Rubber Company is a manufacturer and/or seller of tires.

7. Defendant Spartan Motors, Inc. is the manufacturer of the chassis of the motorhome.

8. Defendant Gulfstream Coach, Inc. is the manufacturer of the coach and its various component parts which was purchased by Plaintiffs Leroy and Donna Haeger.

9. On June 14, 2003, the motorhome owned by Leroy and Donna Haeger and occupied by all of the Plaintiffs, was involved in a rollover accident as a result of the unforeseeable failure of the front tire on the motorhome.

10. Plaintiffs Leroy and Donna Haeger each suffered, and will continue in the future to suffer, from permanent disfiguring personal injuries, loss of each other's consortium, and emotional distress from witnessing the injuries of each other and their family members.

11. Plaintiff Suzanne Haeger suffered, and will continue in the future to suffer, from permanent and disfiguring personal injuries, the loss of her husband's

consortium, and emotional distress from witnessing the injuries to her husband and other family members.

12. Plaintiff Barry Haeger suffered, and will continue in the future to suffer, from bodily injuries, loss of consortium of his spouse, and emotional distress from witnessing the injuries to his spouse and parents.

13. Plaintiff Farmers Insurance Company of Arizona was the insurer of the motorhome and a jeep, which was being towed by the motorhome on the date of the accident.

14. Plaintiff Farmers Insurance Company of Arizona extended benefits to Plaintiffs Leroy and Donna Haeger pursuant to the terms and conditions of its contract of insurance in the amount of $115,800.17 for damages to the motorhome, the jeep and various contents of the vehicles.

15. Plaintiffs each lost various personal property as a result of the accident in an amount to be proven at the time of trial.

16. The Haeger Plaintiffs have incurred various necessary medical expenses, including, but not limited to, air and ground ambulance, hospitalizations, surgeries, physical therapy, medications and costs associated with the provision of necessary medical care including travel, food and lodging. These damages represent liquidated amounts entitling Plaintiffs to an award of prejudgment interest.

17. Plaintiff Farmers Insurance Company of Arizona's expenses provided pursuant to the terms and conditions of its insurance contract represent liquidated sums entitling Farmers to an award of prejudgment interest.

18. Plaintiffs Leroy and Donna Haeger's dog was ejected from the vehicle and suffered serious injuries from the accident which required extensive medical care and expense, which is the obligation of Defendants, in an amount to be proven at the time of trial.

19. Defendants are each responsible for the damages suffered by Plaintiffs.

COUNT ONE

(Strict Product Liability;
Manufacturing and/or Design)

20. Paragraphs 1 through 19 are incorporated herein by this reference.

21. Defendants are manufacturers and/or sellers of products which were defective and unreasonably dangerous as a result of either manufacturing and/or design which proximately caused the accident and Plaintiffs' injuries.

COUNT TWO

(Strict Product Liability; Failure to Warn)

22. Paragraphs 1 through 21 are incorporated herein by this reference.

23. Defendants prepared, utilized and/or ratified all instructions and/or warnings regarding the motorhome, the tires and their use by Plaintiffs.

24. The instructions and/or warnings were defective as they failed to advise, warn or otherwise inform Plaintiffs adequately of the risks of the use of the motorhome and how to avoid catastrophic tire failure which produced the accident and associated injuries.

25. The defective instructions and/or warnings were a proximate cause of the Plaintiffs' injuries.

COUNT THREE

(Strict Liability; Post-Sale Warnings)

26. Paragraphs 1 through 25 are incorporated herein by this reference.

27. Subsequent to the sale of the motorhome Defendants knew of defects in the manufacture, design and/or warnings associated with the motorhome and its tire.

28. Defendants knew how to locate the purchasers of their products and were obligated to warn Plaintiffs of the defects which were discovered subsequent to the sale of the motorhome.

29. Defendants undertook no effort to advise or warn of these defects subsequent to the sale.

30. This post-sale failure to warn was a proximate cause of the accident rendering Defendants liable for Plaintiffs' injuries.

COUNT FOUR

(Strict Liability; Failure to Recall)

31. Paragraphs 1 through 30 are incorporated herein by this reference.

32. Subsequent to the sale, Defendants became aware of defects associated with the motorhome and the tires which required Defendants to recall the product.

33. Defendants failed to recall the product.

34. Such failure was a proximate cause of the accident and Plaintiffs' injuries.

COUNT FIVE

(Negligent Design and/or Manufacture)

35. Paragraphs 1 through 34 are incorporated herein by this reference.

36. Defendants each had a duty to design and/or manufacture their products to protect users of the products from foreseeable risks of harm.

37. Defendants failed to appropriately design and/or manufacture their products, which was a proximate cause of Plaintiffs' injuries.

COUNT SIX

(Negligence; Failure to Warn)

38. Paragraphs 1 through 37 are incorporated herein by this reference.

39. Defendants each had a duty to provide instruction and warnings in such a fashion to protect Plaintiffs from foreseeable risks of harm.

40. Defendants failed to provide adequate instructions and/or warnings and such failure was a proximate cause of Plaintiffs' damages, rendering Defendants liable.

COUNT SEVEN

(Negligence; Post-Sale Failure to Warn)

41. Paragraphs 1 through 40 are incorporated herein by this reference.

42. Subsequent to the sale of the vehicle, Defendants became aware of risks of harm associated with the use of the vehicle, which required Defendants to provide a post-sale warning to users of the vehicle

of risks which potentially could be avoided by post-sale warnings.

43. Defendants knew how to locate the purchasers of their vehicles and could have provided post-sale instructions and/or warnings to avoid foreseeable risks of harm.

44. Defendants failed to provide such post-sale instructions and/or warnings to Plaintiffs and such failure was a proximate cause of Plaintiffs' damages.

COUNT EIGHT

(Negligence; Failure to Recall)

45. Paragraphs 1 through 44 are incorporated herein by this reference.

46. The tires which were originally sold by Defendant Goodyear with the motorhome are no longer manufactured by Goodyear.

47. The tires are no longer manufactured by Goodyear as a result of problems, including performance problems associated with the employment of the tires in motorhomes and other large vehicles.

48. Defendants each were aware of problems associated with the utilization of the tire in motorhomes, including the motorhome involved in this incident.

49. Defendants each failed to participate in a recall of the motorhome and the tires, which should have been undertaken to avoid foreseeable risks of harm.

50. The failure to recall the motorhome and the tires was a breach of Defendants' duties to Plaintiffs and has proximately caused their injuries.

COUNT NINE

(Exemplary Damages)

51. Paragraphs 1 through 50 are incorporated herein by this reference.

52. Defendants were aware of the risks of harm associated with the utilization of their product.

53. Defendants knowingly, willfully and wantonly failed to undertake any effort to protect Plaintiffs from such risks, knowing full well that Plaintiffs were exposed to serious risk of personal injury.

54. Defendant Goodyear's model tire has been involved in various failures which have caused personal injuries to others.

55. Defendants Gulfstream and Spartan were also aware of the history of this model of Goodyear tire's failure and associated injuries to the users of the product, including users of similar motorhomes.

56. Defendants each failed to undertake any effort whatsoever to protect Plaintiffs from the risk of serious injuries associated with the use of their product and in particular, the risks associated with the utilization of the product employing Goodyear's tires.

57. Defendants' actions were knowing, willful and wanton, and substantially certain to expose Plaintiffs to risks of serious personal injuries.

58. Plaintiffs are entitled to an award of punitive damages to punish Defendants and to deter them from similar future conduct in an amount to be proven at the time of trial.

WHEREFORE, Plaintiffs request judgment be entered in their favor for all damages proximately

caused by the acts and omissions of Defendants, including an award of prejudgment interest, punitive damages and costs incurred herein.

DATED this 13th day of June, 2005.

THE KURTZ LAW FIRM

By: /s/ David L. Kurtz
David L. Kurtz

COZEN O'CONNOR

By: /s/ Blanca Quintero
Blanca Quintero

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

CIVIL MINUTES - JURY TRIAL

CV-05-02046-PHX-ROS DATE: 4/14/10
Year Case No Initials

Title: Donna Haeger, et al.
Plaintiffs

vs.

Goodyear Tire & Rubber Company
Defendant

HON: ROSLYN O. SILVER Judge # 7022

Deputy Clerk: Christine Boucher

Court Reporter: Elaine Cropper

Michael O'Connor and David Kurtz
Attorney(s) for Plaintiff(s)

Graeme Hancock, Basil Musnuff, and Scott Freeman
Attorney(s) for Defendant(s)

PROCEEDINGS: X JURY TRIAL
__ NON-JURY TRIAL
__ VOIR DIRE
__ JURY SWORN

Trial day # 1

8:34 a.m. This is the time set for a Jury Trial. Counsel are present. Jury panel is not present. The parties inform the Court they have reached a settlement. The Clerk of Court is directed to close the case. 8:37 a.m. Court is in recess while the settlement agreement is placed on the record under seal.

8:53 a.m. Court reconvenes. IT IS ORDERED that all pending motions to unseal documents from the Plaintiffs are withdrawn. All documents that have already been sealed will remain sealed. IT IS FURTHER ORDERED that all exhibits are released to the parties. IT IS FURTHER ORDERED that counsel are to submit all copies of the juror questionnaires and all copies of the jury list to the Court, no later than Friday, April 16, 2010. The jury is ordered released. 8:54 a.m. Court is adjourned.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: 10/05/11]

No. CV-05-2046-PHX-ROS

LEROY HAEGER, *et al.*,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER CO., *et al.*,

Defendants.

ORDER

Plaintiffs have filed a Motion for Sanctions and a Motion to Compel. There are serious questions regarding Defendant's conduct in this case and it is well-established that "a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Pursuant to that power, Defendant will be ordered to produce to Plaintiffs, and file with the Court, the test results at issue.

Accordingly,

IT IS ORDERED no later than October 7, 2011 Defendant shall produce to Plaintiffs, and file on the docket, the test results at issue.

IT IS FURTHER ORDERED the Motion to Compel (Doc. 949) is DENIED AS MOOT.

Dated this 4th day of October, 2011.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: 03/14/12]

No. CV-05-02046-PHX-ROS

LEROY HAEGER, *et al.*,

Plaintiffs,

vs.

GOODYEAR TIRE & RUBBER CO., *et al.*,

Defendants.

ORDER

In filing the briefs due on March 16, 2012, Fennemore Craig, P.C. and Graeme Hancock; Roetzel Andress, LPA and Basil Musnuff; and Goodyear Tire & Rubber Co. (collectively, "Defendants") must address the following issues:

1) The plaintiffs in *Schalmo v. Goodyear* requested Goodyear "[p]roduce all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of G159 tires." (Doc. 992-1 at 4). In response to this request, Goodyear produced the "Laboratory Durability Testing – Heat Rise" test data. (Doc. 992-1 at 5). Defendants must address why the Heat Rise tests *were* produced in response to the *Schalmo* request quoted above but *were not* produced in response to Plaintiffs' Third Request for Production

of Documents.[1] (Doc. 938-1 at 17). Defendants should also explain, in detail, why other tests produced in response to the *Schalmo* request quoted above were not produced in this case.

2) On March 13, 2012, Goodyear filed a "Notice of Correction." (Doc. 989). According to that notice, the statement that Goodyear produced "crown durability, bead durability and DOT endurance test reports" was inaccurate. Defendants should state in *unequivocal* terms (*i.e.*, "yes" or "no") whether the "crown durability, bead durability and DOT endurance test reports" should have been produced in this case. If the answer is "yes," Defendants must explain the failure to do so. If the answer is "no," Defendants must explain why the tests were not responsive.

3) Defendants should state in *unequivocal* terms whether the results of the Heat Rise tests conflict with *any* representation made during this litigation. For example, Defendants should indicate whether any of Goodyear's representations in connection with the summary judgment motions are contradicted by the Heat Rise tests. Defendants should also indicate whether the Court's proposed order is accurate when it states that disclosure of the Heat Rise tests would have "severely compromised" Goodyear's defense of this case.

4) Defendants must state in *unequivocal* terms who is responsible for not producing the Heat Rise tests. In

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[1] In her declaration, Deborah A. Okey states the Heat Rise tests were produced in Schalmo because "the plaintiffs specifically sought discovery relating to, among other things, heat testing." (Doc. 984-1 at 5). Goodyear should address whether this statement is accurate considering the actual discovery request in Schalmo.

other words, Defendants should assume the Court believes the Heat Rise tests should have been produced. Under that assumption, which of the three entities (Goodyear; Fennemore Craig, P.C. and Graeme Hancock; or Roetzel & Andress, LPA and Basil Musnuff) should be held responsible for the failure to do so.

5) Defendants must state whether the Heat Rise tests were produced in the *Bogaert v. Goodyear* case. If they were not produced, Defendants should explain the failure to do so. Accordingly,

IT IS ORDERED the briefs due on March 16, 2012 shall address the issues outlined above. Based on the additional information being required, Defendants briefs may be up to fifteen pages in length.

IT IS FURTHER ORDERED Basil Musnuff shall attend the March 22, 2012 hearing in person.

DATED this 14th day of March, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 03/21/12]

No. CV-05-2046-PHX-ROS

LEROY HAEGER, *et al.*,

Plaintiffs,

vs.

GOODYEAR TIRE & RUBBER CO., *et al.*,

Defendants.

ORDER

The parties have completed briefing the motion for sanctions. Based on their submissions, it is clear that Goodyear and its counsel remain committed to advocating seemingly untenable positions. For example, Goodyear and its counsel seek to justify withholding heat testing of the tire at issue in this case despite the fact that Plaintiffs, the Court, and defense counsel knew Plaintiffs' defect theory involved heat issues. Rather than appearing contrite, Goodyear and its counsel have sought to justify their actions through hypertechnical parsing of their actions during discovery. This is directly contrary to long-established authority. *See* Fed. R. Civ. P.34 advisory committee's notes, 1993 Amendments, Subdivision (a) ("[Discovery requests] should not be read or interpreted in an artificially restrictive or hypertehncial manner to avoid disclosure of information fairly covered by the discovery request . . . ."). Attempting to justify the

unjustifiable strengthens the Court's belief that sanctions are appropriate. *Cf. Valdez-Castillo v. Busch Entm't Corp.*, 2008 WL 4999175, at *5 (S.D. Fla.) (declining to impose sanctions when the attorney "appeared genuinely contrite" for his errors).

The approach taken by Goodyear and its counsel risks grave harm to their reputations. Shakespeare famously identified the folly of such actions:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands.
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.

Othello, act 3, sc. 3. This is especially applicable to lawyers because, as Justice Stevens observed, "most lawyers are wise enough to know that their most precious asset is their professional reputation." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413 (1990) (Stevens, J., concurring in part and dissenting in part).

If they plan on continuing to defend their actions on the merits, Goodyear and its counsel should be prepared to present substantially more compelling justifications than those they have proffered to date. If such justifications are not available, Goodyear and its counsel should give serious consideration to settling this matter with Plaintiffs.

Finally, the parties will be directed to file a list of those individuals whom they wish to call to testify at the hearing on March 22, 2012. These individuals will

be subject to direct examination as well as cross-examination by opposing counsel and the Court.

Accordingly,

IT IS ORDERED no later than 5:00 p.m. on March 21, 2012 the parties shall file a joint statement identifying the individuals who will testify at the March 22, 2012 hearing. The statement should identify the planned scope of each individual's testimony.

DATED this 21st day of March, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

[Filed 12/13/12]

[Title omitted in printing.]

PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND COSTS WITH SUPPORTING DECLARATIONS

On November 8, 2012, this Court entered its Order imposing sanctions on Goodyear and its counsel and requiring Plaintiffs to file documentation establishing the amount of attorneys' fees and costs incurred after November 1, 2006, the date Goodyear filed its Supplemental Responses to Plaintiffs' First Request for Production (Dkt. #1073, p. 64).

In compliance with this Court's Order, Plaintiffs have provided herewith the time and cost information for The Kurtz Law Firm, Jennings, Strouss & Salmon, P.L.C. ("JSS") and Abernethy & Green. The time records and cost expenditures are fully supported by the attached Declarations of Plaintiffs' counsel, each of which has been prepared in accord with the Court's Order. See Declaration of David L. Kurtz, attached hereto as Exhibit 1; Declaration of Michael J. O'Connor, attached hereto as Exhibit 2; Declaration of James Abernethy, attached hereto as Exhibit 3. They are further supported by the three attached Declarations of Disinterested Counsel. See Exhibits 4-6.

The Court's Order instructed Plaintiffs to file the documentation in support of attorneys' fees and costs "as required by Local Rule" (Dkt. #1073, p. 66). The

Local Rule relating to attorneys' fees and related non-taxable expenses, provides:

> This Local Rule does not apply to claims for attorneys' fees and related non-taxable expenses which may have been recoverable as an element of damages or to claims for attorneys' fees and related expenses for violations of the Federal Rules of Civil Procedure or under 28 U.S.C. § 1927.

LR Civ. 54.2.

Even though Rule 54.2, by its own terms, does not apply in this context, the declarants have provided submittals generally consistent with the spirit and intent of the Rule to assist the court in the exercise of its discretion. Each of the Haegers' attorneys has been mindful of the Court's intention to enter a fee award pursuant to the lodestar method (see Dkt. # 1073, p. 51, n. 23), and have endeavored to provide the Court with detailed time records, related cost expenditures and detailed Declarations.

The lodestar approach for an attorney fee award contemplates establishment of a fee that "the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenney A., ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010). The reasonable hourly rate is determined by consideration of the prevailing market rate in the community for similar services of lawyers of comparable skill, expertise and reputation. *Dang v. Cross*, 422 F.3d 800, 814 (9th Cir. 2005). The reasonable fee calculation also considers the complexity of the issues, the quality of the representation, and the results obtained. *Morales v. City of San Rafael*, 96 F.3d 359, 364 n.9 (9th Cir. 1996)

The use of current market rates as a way to compensate for delay has been approved by the U.S. Supreme Court. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) ("In setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value."); *Perdue v. Kenny A.*, 130 S. Ct. 1662 at 1675 (same).

The detailed time records and supporting Declarations set forth total fee and cost expenditures as follows:

The Kurtz Law Firm attorneys' fees:	$2,044,311.50
The Kurtz Law Firm costs:	$ 259,013.29
JSS attorneys' fees:	$ 502,946.00
JSS costs:	$ 32,466.60
Abernethy & Green attorneys' fees:	$ 45,320.00
Total attorneys fees:	**$2,592,577.50**
Total costs: $	**291,479.89**

Having complied with the directives specified in the Court's November 8, 2012 Order (Dkt. #1073), Plaintiffs hereby request that the Court enter its order awarding attorneys' fees and costs in the **total amount of $2,884,057.39** as the appropriate sanction for the egregious misconduct more fully specified in that 66-page order.

RESPECTFULLY SUBMITTED this 13th day of December, 2012.

THE KURTZ LAW FIRM

By: /s/ David L. Kurtz
David L. Kurtz

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed 01/10/13]

[Title omitted in printing.]

DEFENDANT THE GOODYEAR TIRE & RUBBER COMPANY'S RESPONSE AND OBJECTIONS TO PLAINTIFFS' APPLICATION FOR ATTORNEYS' FEES AND COSTS

PRELIMINARY STATEMENT

Defendant The Goodyear Tire & Rubber Company ("Goodyear") respectfully submits its response and objections to Plaintiffs' Application for Attorneys' Fees and Costs ("Fee Request") (ECF 1082).[1]

The Court's November 8, 2012 Order directed plaintiffs to file their application for attorneys' fees as required by Local Rule. (ECF 1073 at 60) As such, Goodyear was expecting plaintiffs to contact its counsel in a good faith effort to resolve potentially disputed issues relating to fees and costs as LRCiv 54.2(d)(1) requires. Rather than follow the dictates of the Local Rule, plaintiffs filed their fee application seeking almost $3 million for a period of over six years without

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[1] In filing this Response, Goodyear does not waive its right to appeal the Court's November 8, 2012 order granting sanctions in favor of plaintiffs ("Order") (ECF 1073). Nor should this opposition to plaintiffs' fee petition be construed as waiving the impropriety of this Court's Order requiring payment of all fees from November 2006 onward as opposed to incremental fees caused by Goodyear's alleged discovery misconduct, as required by Ninth Circuit law. *See Miller v. City of L.A.*, 661 F.3d 1024, 1029 (9th Cir. 2011).

any consultation with Goodyear's counsel. Accordingly, Goodyear is constrained to delineate each of the deficiencies contained in plaintiffs' billing entries and seek the appropriate relief.

Plaintiffs' Application for Attorneys' Fees and Costs seeks almost $3 million which is unreasonable on its face. Such an amount exceeds any sanction ever awarded by the District of Arizona for allegedly similar conduct. A nearly $3 million sanctions award undermines established precedent that sanctions should be compensatory and not vindictive. Courts routinely reduce a large fee request by a significant percentage off of the top when faced with such a high number. *See Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir. 2002) ("In appropriate cases, the district court may adjust the 'presumptively reasonable' lodestar figure based upon the factors listed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975)."). Such a reduction is warranted here.

Further, as noted there are multiple deficiencies in plaintiffs' fee application which warrant a denial or significant reduction in the amount of fees and costs. First, a substantial number of the time entries submitted by plaintiffs, especially in the early stages of the case, fall well outside the legitimate scope of the Court's Order or Goodyear's allegedly sanctionable conduct. Second, most of plaintiffs' time entries are vague and ambiguous. Thus, they not only lack the information required pursuant to LRCiv 54.2, but they also make it difficult if not impossible for Goodyear or the Court to determine if the time entry at issue is recoverable. Third, plaintiffs' Fee Request is replete with examples of duplicative tasks being performed by multiple time keepers, either within the same firm, or among the three law firms that represent plaintiffs.

Such entries, if compensable, should only be reimbursed once. Fourth, plaintiffs' time entries are often excessive for the nature of the tasks described. Such entries should be reduced to an amount proportionate to the task performed. Fifth, many of plaintiffs' time entries are for clerical, administrative or secretarial tasks performed by legal assistants or attorneys, which are not recoverable at all. Such time should be written off entirely. Sixth, virtually all of plaintiffs' time entries are provided in block billing format, making it impossible to discern which time is properly recoverable and which time is not. Finally, plaintiffs have acknowledged submitting reconstructed time entries from August 11, 2009 through December 31, 2010, which entries are not recoverable. In addition to plaintiffs' overreaching with respect to time entries, most of the "costs" submitted by plaintiffs are not recoverable under LRCiv 54.2. Plaintiffs' failure to comply with the express requirements of LRCiv 54.2, allows for complete denial of their petition or at least a substantial reduction.

A. Plaintiffs' Requested Fees And Expenses Are Unreasonable And Their Fee Request Does Not Comply With LRCiv 54.2

It is firmly established in the Ninth Circuit that "the amount of monetary sanctions [pursuant to a court's inherent authority] must be 'reasonable.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006); *see also Rosensweig v. Bally Total Fitness Corp.*, 14 Fed. Appx. 765, 766 (9th Cir. Cal. 2001) ("Sanctions must be reasonable in amount, and when they are based upon attorneys' fees, those fees must be reasonable under the circumstances."). *Iglesias v. City of Goodyear*, 2012 U.S. Dist. LEXIS 120294, *9 (D. Ariz. Aug. 23, 2012) ("Sanctions must be reasonable in amount,

particularly so where, as here, the amount of the sanction is based upon the attorney's fees claimed by the other party."). In calculating sanctions the Court "must demonstrate some connection between the amount of monetary sanctions it imposes and the sanctionable conduct by the violating party." *Carroll v. Jaques*, 926 F. Supp. 1282, 1291 (E.D. Tex. 1996). The Court should impose the least severe sanction adequate to achieve the purpose of the rule under which it was imposed. "District courts must demonstrate that sanctions are not vindictive or overly harsh reactions to objectionable conduct, and that the amount and type of sanction was necessary to carry out the purpose of the sanctioning provision." *Id.*

In determining a reasonable attorney's fee, some courts apply the "lodestar" method. In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Supreme Court outlined the proper method for determining reasonable attorneys' fees using the lodestar method and held that the court may decrease the amount of hours in the calculation where the prevailing party's counsel inadequately documents their hours. *Id.* at 433. The Court ". . . should exclude from the lodestar amount hours that are not reasonably expended because they are 'excessive, redundant, or otherwise unnecessary.'" *Van Gerwen v. Guarantee Mutual Life Company*, 214 F.3d 1041, 1045 (9th Cir. 2000) (quoting *Hensley*, 461 U.S. at 434).

LRCiv 54.2, entitled "Attorneys' Fees and related Non-Taxable Expenses" is the Local Rule for the District of Arizona that governs attorney fee requests. The rule provides a series of mandatory procedural and substantive requirements in connection with filing an application for attorneys' fees. Plaintiffs have failed to comply with many of these requirements. *See*

Schrum v. Chem. Lime Co. of Ariz., 2008 U.S. Dist. LEXIS 43184, *10-11 (D. Ariz. May 30, 2008) (the requirements of LRCiv 54.2 are "mandatory").

As mentioned, plaintiffs have not consulted with Goodyear as required by LRCiv 54.2(d)(1) which states that a Court may not consider a motion for an award of attorneys' fees absent a statement of personal consultation:

> No motion for an award of attorneys fees will be considered unless a separate statement of the moving counsel is attached to the supporting memorandum certifying that, after personal consultation and good faith efforts to do so, the parties have been unable to satisfactorily resolve all disputed issues relating to attorneys' fees or that the moving counsel has made a good faith effort, but has been unable, to arrange such conference.

Plaintiffs have not made any effort to set up such a consultation with Goodyear prior to filing their Fee Request nor offered a justifiable excuse for their failure to do so. Thus, the Court may choose not to consider plaintiffs' Fee Request. *Schrum* at *7. Indeed, the *Schrum* court reiterated the admonition from *Rudebusch v. Arizona*, 2007 U.S. Dist. LEXIS 70690 (D. Ariz. Sept. 20, 2007) that "'counsel are forewarned[,]' however, 'that future fee motions must include this Statement [in the first instance], or the court will not consider them.'" *Schrum* at *8.

Further, plaintiffs have failed to provide the fee agreement required under LRCiv 54.2(d)(2), which states that "[a] complete copy of any written fee agreement, or a full recitation of any oral fee agree-

ment must be attached to the supporting memorandum." Plaintiffs' counsels' declarations neither describe nor attach the fee arrangements between plaintiffs and their counsel. In addition to ensuring that plaintiffs' recovery is proper, plaintiffs' fee agreement is needed to avoid duplicative payment of expenses. Goodyear and the Court are entitled to this information prior to the determination of any award. *Id.*

B. Plaintiffs' Time Records Do Not Comply With The Local Rules or Ninth Circuit Law and Should Be Substantially Reduced

In addition to failing to comply with the basic prerequisites entitling a party to fees, plaintiffs' violations of numerous provisions of LRCiv 54.2 compel that the fees requested by plaintiffs be reduced for each of the following independent reasons. Cumulatively, these defects necessitate a substantial deduction of plaintiffs' requested fees. Goodyear incorporates herein its Joint Exhibit (ECF 1100) which includes at Ex. A an annotated copy of plaintiffs' Fee Request which reflects the unrecoverable nature of the entries. The annotations are accompanied by a key explaining the basis for each objection by capital letter (A-I).

1. Block Billing

Virtually all of plaintiffs' time entries are block billed, which is impermissible under LRCiv 54.2 and Ninth Circuit law. Plaintiffs' improper use of this billing format requires the Court to make an across the board reduction in plaintiffs' Fee Request. *Center for Biological Diversity v. Salazar*, 2012 U.S. Dist. LEXIS 164203 *12-15 (D. Ariz. November 15, 2012) (deducting an additional 10% after applying the 65%

figure, to account for block billing that clearly is impermissible.) "Block billing makes it more difficult to determine how much time was spent on particular activities and thus whether the associated fees are reasonable. A court may reduce the requested hours where counsel has lump[ed] together multiple tasks, making it impossible to evaluate their reasonableness." *Mohajerin v. Pinal County*, 2008 U.S. Dist. LEXIS 121814, *5 (D. Ariz. 2008) (internal citations omitted) (court reduced block billed entries by 30%). Similarly, the Ninth Circuit affirmed a 30% reduction for block billing where 80% of the billing entries were block billed. *Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1222-23 (9th Cir. 2010) (recognizing California State Bar Committee Report in Mandatory Fee Arbitration concluding that block billing can increase time billed by 30%.).

The following entries are representative examples of improper block billing:

Date	Time-keeper	Task	Time	Rate	Total
5/5/07	David Kurtz	Email to Voce regarding documents; email to Morrison regarding documents; review subpoena duces tecum; review Salem and Osborne files for supplemental production; review documents for depositions; attend meeting with client	11.5	$500 /HR	$5750

5/16/07	David Kurtz	Review Pullen transcript; multiple emails regarding deposition scheduling, telephone conference with Lewallen, telephone conference with Abernethy; correspondence to parties; prepare for hearing	7.5	$500 /HR	$3750
6/5/07	David Kurtz	Telephone conference with Abernethy; review and revise discovery requests; draft multiple deposition notices; review rebuttal reports; review 19th disclosure statement	6.6	$500 /HR	$3300
8/3/07	David Kurtz	Attend meeting with O'Connor regarding file review; revisions to scheduling order and discovery dispute; draft discovery dispute based on upon final file review; review Salem file regarding additional production; select documents for supplemental disclosure statement; draft supplemental disclosure statement; draft additional discovery; telephone conference with O'Connor regarding new pleading	9.8	$500 /HR	$4900

As made clear by these examples, counsels' practice of utilizing block billing makes it almost impossible to

determine how much of the total time recorded is associated with a properly reimbursable task. This is especially egregious here where so many of the block billed entries include other non-recoverable tasks (i.e. duplicative, secretarial, beyond the scope, vague). While a 30% reduction is often used for the improper practice of block billing, the reduction required here is even greater.

2. Recreated Time Entries for August 11, 2009 Through December 31, 2010

The party seeking to be compensated for time spent has the burden to provide contemporaneous time records. "An attorney's post facto review of the file, and a reflective judgment as to the hours devoted to the project are not sufficient for this purpose." *State of Arizona v. Maricopa County Med. Soc.*, 578 F.Supp. 1262, 1267 (D. Ariz. 1982) (disallowing reconstructed time of 174.1 hours). *See also, American Law Center, PC v. Stanley*, 253 F.3d 438, 443 (9th Cir. 2001). Nonetheless, Mr. Kurtz acknowledges that he has re-constructed his time records for more than seventeen months from August 11, 2009 through December 31, 2010. (ECF 1082-1). Mr. Kurtz's excuse that he was too busy with trial to keep time records and that maintaining time records was not sufficiently important flies in the face of LRCiv 54.2 and case law. ("As the first trial setting approached, I devoted myself almost exclusively to this matter seven days a week. Meeting the tasks at hand was far more important than keeping detailed time records." *Id.* at ¶ 18).

> Plaintiff has the burden of establishing the reasonableness of her fee request, and applicants must submit contemporaneous time records of hours worked and rates

> claimed which sufficiently document the services rendered and prove their reasonableness. *Where documentation is inadequate or represents a recently compiled retrospective estimation of time expended, the district court would do violence to its judicial obligations were it to accept the amounts claimed at their value.*

Stevens v. Astrue, 2011 U.S. Dist. LEXIS 65397, *9-10 (D. Ariz. June 17, 2011) (internal citations omitted and emphasis added). *See also Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. Dist. LEXIS 160668, *24 (N.D. Cal. Nov. 7, 2012) ("Although parties seeking attorneys' fees are required only to provide affidavits sufficient to enable the court to consider all the factors necessary to determine a reasonable attorney's fee award, parties are subject to a reduction in the hours awarded when they fail to provide adequate documentation, notably contemporaneous time records.") (internal citations omitted).

Plaintiffs' counsel admits to not maintaining time records for over seventeen months,[2] and seemingly did not do so for an additional period of almost two years. Now years later, plaintiffs "compiled a retrospective estimation of time expended." This is impermissible and such time amounting to likely over double the $146,000 conceded need be wholly deducted or at minimum substantially reduced.

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[2] Interestingly, on Mr. Kurtz's November 13, 2012 time entry he records 2.1 hours to: "Draft time records since January 2011," which is in marked distinction to his Declaration where he attests: "I again kept detailed time records from January 1, 2011 to date." Kurtz Declaration in Support of Fee Application at ¶ 18. Accordingly another substantial reduction encompassing almost two additional years of recreated time is in order.

Plaintiffs' recreated time entries are marked with the letter A on Exhibit A to the Joint Exhibit.

3. Fees for Preparing Fee Petition and Recreating Time

Similarly, plaintiffs' claim for fees on fees is not permitted. LRCiv 54.2(c)(2) does not allow for recovery of fees for preparing a fee application without authorization. Here plaintiffs have cited no law entitling them to such recovery. *Aviva USA Corp. v. Vazirani*, 2012 US LEXIS 89489 *6 (D. Ariz. June 28, 2012) (rejected request for fees on fees without establishing entitlement per LRCiv 54.2); *Croomes v. Stream Global Servs.-Az, Inc.*, 2012 U.S. Dist. LEXIS 52057, *10 (D. Ariz. Apr. 12, 2012) ("Defendant has not cited any legal authority in support of its claim for counsel's time spent in preparing Defendant's motion for fees and costs, and this Court did not state in its March 8, 2010 order (ECF 43) that Defendant was entitled to such fees. Accordingly, Defendant is not entitled to payment for the 2.5 hours of attorney time spent in preparing its motion for fees and costs."). Moreover, beyond seeking recompense for their fee petition plaintiffs go even further and request fees for the time spent recreating their fees which themselves are not recoverable.

Plaintiffs are seeking a total of $38,039.59 for preparing their fee petition and recreating time all of which is impermissible.

4. Entries Outside the Scope of the Court's Sanctions' Order

As asserted by Goodyear in prior briefing, plaintiffs are only entitled to recover fees resulting from Goodyear's allegedly sanctionable conduct. *Miller* 661 F.3d at 1029 ("the amount awarded had to compensate

the Millers for the damage actually caused. . ."); *see also Brown v. Baden* (*In re Yagman*), 796 F.2d 1165, 1185 (9th Cir. 1986) (reversed on other grounds) ("Recovery should never exceed those expenses and fees that were reasonably necessary to resist the offending action."); *see also Swofford v. Eslinger*, 671 F. Supp. 2d 1274, 1287 (M.D. Fla. 2009) (emphasis added) (citing *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1239 (11th Cir. 2007) ("Because this sanction is imposed pursuant to the Court's inherent authority, the amount of fees and costs awarded may not exceed the costs, expenses, and attorneys' fees reasonably incurred *because of the sanctionable conduct*."); *Chosin Few, Inc. v. Scott*, 209 F. Supp. 2d 593, 605 (W.D.N.C. 2002) ("In other words, those costs, expenses, and attorney's fees which are the proximate result of an attorney's misconduct are recoverable.").

Although the Order does not limit plaintiffs' recovery of fees and costs to those actually caused by the alleged misconduct (ECF 1073 at 64), a substantial portion of the fees sought by plaintiffs would have necessarily been incurred regardless of Goodyear's behavior. Clearly, as sanctions are intended to deter wrongful conduct and not be overly punitive, a court cannot condone sanctioning a party for time and expense necessarily required to prosecute plaintiffs' case. Plaintiffs chose to bring a product liability suit against multiple defendants, which, by necessity compelled plaintiffs to investigate and develop liability cases against the other defendants as well as medical/damage claims on behalf of each of the plaintiffs. Such work was integral to plaintiffs' case notwithstanding any action by Goodyear.[3] Accordingly,

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[3] Further, any suggestion that production of the heat rise test would have brought the case to an earlier resolution and obviated

the entries relating to Spartan, Gulfstream or medical/ damages are wholly distinct from the issues at hand and are thus not recoverable. Goodyear submits the following entries as representative examples of tasks outside of the scope of the Order which are not recoverable:

Date	Time-keeper	Task	Time	Rate	Total
1/24/07	David Kurtz	Prepare for and attend meeting with Dasse (counsel for intervenor Margaret Bogaert)	3.4	$500/ HR	$1700
2/13/07	David Kurtz	Prepare for Spartan deposition	4.0	$500/ HR	$2000
6/1/07	David Kurtz	Multiple telephone calls with Casey; telephone conference with Stuart regarding ethics issues; draft disclosure statement; review and revise discovery motion; email from Ott regarding discovery; telephone call to Abernathy, telephone call from Abernathy, telephone call from Salem	3.6	$500/ HR	$1800

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the fees plaintiffs are seeking is without evidentiary basis. *See Schalmo v. Goodyear* (which did not settle, but in fact proceeded through a jury verdict).

7/21/07	M O'Connor	Telephone conference with David Kurtz re to do's; review materials Abernathy & Medical Issues Green	4.0	$445/ HR	$1780 $45320

Finally, a number of plaintiffs' entries are for travel time, which is not recoverable under LRCiv 54(e)(2)(D) and thus beyond the scope of this Court's Order.

Entries which include this objection amount to $722,406.52 and should be disallowed or substantially reduced.

5. Incomplete and Vague Entries or Lack of Required Information

LRCiv 54.2(e)(2) requires that the "party seeking an award of fees must adequately describe the services rendered so that the reasonableness of the charge can be evaluated" and failure to do so may compel the court to reduce the award accordingly. This is supported by Ninth Circuit case law as well. *Neil v. Comm'r of Soc. Sec.*, 2012 U.S. App. LEXIS 23159, *3-4 (9th Cir. Nov. 9, 2012) (*citing Brandt v. Astrue*, 2009 U.S. Dist. LEXIS 50268 (D. Or. 2009) at *7 ("Where billing records are lacking in detail, a reviewing court may reduce the fee to a reasonable amount.").

Many of plaintiffs' entries are vague and ambiguous, or lack information required by LRCiv 54.2(e), thus making it difficult if not impossible for Goodyear to determine the validity of the entry. Examples of vague descriptions by Mr. Kurtz include "organize materials for expert meeting," "prepare for deposition," and general reference of teleconferences or correspondence without a description of the nature of such communications. Indeed, in *Schrum*, the court found time

entries similar to those here ("work on BSNF's Answer, work on motion to strike, draft discovery requests") to be in derogation of the mandatory requirements or LRCiv 54.2. *Schrum* at *26.

Furthermore, all telephone conferences must identify the participants and the reason for the telephone call, which plaintiffs fail to do. LRCiv 54.2(e)(2)(A).

Goodyear submits the following entries as representative examples of vague or incomplete time entries which are not recoverable:

Date	Timekeeper	Task	Time	Rate	Total
1/29/07	David Kurtz	Review document summary	2.0	$500/HR	$1000
2/1/07	David Kurtz	Telephone conference with client	.60	$500/HR	$300
5/10/07	David Kurtz	Attend depositions	8.9	$500/HR	$4450
5/17/07	David Kurtz	Prepare for and attend hearing	3.0	$500/HR	$1500
5/23/07	David Kurtz	Summarize exhibits	4.5	$500/HR	$2250

For a complete itemization of all vague time entries, see Joint Exhibit, Ex. A marked with the letter C. Entries which include this objection total $603,356.00 and should be disallowed or substantially reduced.

6. Duplicative and Excessive Time Entries and Multiple Time Keepers Performing the Same Task

Close inspection of plaintiffs' time records reveals the duplicative and excessive nature of plaintiffs' requested fees which Ninth Circuit law finds improper. "We hold that the district court acted within the bounds of its discretion in reducing the lodestar for unnecessary and duplicative work." *Chemical Bank v. City of Seattle* (*In re Washington Pub. Power Supply Sys. Sec. Litig.*), 19 F.3d 1291, 1298 (9th Cir. 1994); *see also Resolution Trust Corp. v. Titan Fin. Corp.*, 36 F.3d 891, 892 (9th Cir. 1994) ("We grant Sellan's motion, but deduct from the total $ 440 for unrelated matters and $ 11,215.75 for inappropriate, duplicative, or excessive entries in the time sheets"). There are numerous examples of duplicative time entries among the law firms representing plaintiffs in this matter. Many of those tasks could have been adequately accomplished by one law firm. For example, on April 13, 2010 both Mr. O'Connor and Mr. Kurtz each billed 5 hours for attending a pretrial conference, for a total fee of $4725. Similarly, on April 9, 2010 Mr. O'Connor billed 7.5 hours for preparing for and attending a pretrial conference. On the same date, Mr. Kurtz billed 8.5 hours with the same time description. The total billed on that date by both counsel was $7587.50. At $500/hour for Mr. Kurtz's time, the effect of duplicative and excessive time entries underscore the unreasonableness of plaintiffs' almost $3 million fee request.

Many of plaintiffs' time entries are also excessive. On February 11, 2011 Mr. Kurtz billed 8 hours simply to "Research re discovery fraud, sanctions and relief" for a total fee of $4000. On March 21, 2012 he billed

8.2 hours for a total fee of $4100 with a description of "Prepare for hearing; review filings." These amounts are clearly excessive and must be reduced.

Furthermore, in violation of the Court's June 15, 2012 Order limiting the parties' supplemental briefing to 22 pages (ECF 1029) and without leave of Court, plaintiffs filed a 34 page Statement of Facts (ECF 1047) along with their Supplemental Brief on June 22, 2012 (ECF 1076). Thus, the greater than twenty hours billed by Mr. Kurtz for drafting the Statement of Facts is clearly outside the scope of the Court's Order, as well as excessive, and should be deducted accordingly from any fee award.

An itemized list of all such excessive and duplicative entries is incorporated herein as Ex. A to the Joint Exhibit and marked by the letters E and H. Entries which include duplicative and/or excessive time total $599,329.50, and should be disallowed or substantially reduced.

7. Clerical or Administrative Tasks

Tasks which are clerical in nature are not recoverable. *See, Missouri v. Jenkins*, 491 U.S. 274, 288, n. 10 (1989) ("purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them"). *See also, Schrum v. Burlington N. Santa Fe Ry. Co.*, 2008 U.S. Dist. LEXIS 43184, *32 (D. Ariz. May 29, 2008). As explained by the court in *Schrum*, "[t]he rationale underlying this exclusion is that '[w]ork that is clerical in nature should be subsumed in a law firm's overhead.'" *Id.* (internal citations omitted); *see also Ctr. for Biological Diversity v. Salazar*, 2012 U.S. Dist. LEXIS 164203, 12-15 (D. Ariz. Nov. 15, 2012) (same).

Despite this prohibition, plaintiffs are attempting to recover both attorney and paralegal time for clerical work. This time must be denied on its face as the descriptions are clearly secretarial, administrative or clerical in nature. Goodyear submits the following entries as representative examples of clerical and/or secretarial tasks which are not recoverable:

Date	Time-keeper	Task	Time	Rate	Total
11/7/06	Kerry Chrisman	Make file folder for Judge Silver opinions regarding Daubert	.20	$165/HR	$33.00
1/3/07	Kerry Chrisman	Prepared list of due dates from scheduling order; office conference with D. Kurtz regarding same	.30	$165/HR	$49.50
1/23/07	Kerry Chrisman	Make notebooks for pneumatic tire Chrisman report	2.0	$165/HR	$350.00
4/6/07	Kerry Chrisman	Fill out transcript order form for hearing; e-file same	.30	$165/HR	$49.50

There are numerous similar entries listed by Ms. Chrisman that include tasks such as scanning documents, photocopying documents and bates labeling documents as well as several like entries by Mr. Kurtz. See Joint Exhibit, Ex. A where such entries are marked by the letter G. Entries with clerical time total $491,484, and should be completely disallowed.

C. Plaintiffs' Requested Costs are Not Recoverable

In addition to the unreasonable amount of fees sought by plaintiffs, plaintiffs also seek $291,479.89 in "costs." Plaintiffs apparently assume they are entitled to all costs and expenses incurred since November 2, 2006, notwithstanding the clear dictates of LRCiv 54.2. The costs submitted by plaintiffs include, for example, travel expenses, vague descriptions for photocopying and scanning documents, unrelated expert fees, mail and Federal Express costs, etc.

LRCiv 54.2(e)(3) states that in order to recover for any costs or expenses incurred, "Counsel should attach copies of applicable invoices, receipts and/or disbursement instruments. Failure to itemize and verify costs may result in their disallowance by the court." Plaintiffs have not attached any receipts or other forms of verification for any of the expenses they seek to recover. Furthermore, for the same reasons that certain fees are not recoverable, many costs are similarly not recoverable. For example, many of the entries are vague, duplicative or outside of the scope of the Court's Order and otherwise necessarily incurred to prosecute plaintiffs' suit. Accordingly, if the Court concludes that certain costs are recoverable, the amount should be drastically reduced.

The following entries as representative examples of costs submitted by plaintiffs are not recoverable:

Date	Expense	Amount
4/10/07	Research fees advanced – Westlaw	$2549.83
5/31/07	Photocopies	$2282.80
6/10/07	Travel Expenses Advanced – David L. Kurtz; airfare	$1648.70
4/5/10	Photocopy Expenses Advanced – Teris	$6228.09

See Joint Exhibit, Ex. A for Goodyear's annotations of plaintiffs' request for costs displaying which costs are recoverable and which are not. These entries are marked by the letter D. Plaintiffs seek $231,259.78 of unrecoverable costs which should be disallowed in their entirety.

CONCLUSION

Plaintiffs' fee application seeking almost $3 million is both overreaching and excessive. Contrary to law, it is neither reasonable nor in compliance with LRCiv54.2. Indeed, such a requested award undermines established precedent that sanctions should not be vindictive. Accordingly, plaintiffs' requested fees and costs must be denied or substantially reduced.

Plaintiffs' exorbitant request for $2,592,577.50 in attorneys' fees includes recreated time (of at least $146,550)[4], fees on fees ($38,039.59) and clerical work ($491,484) totaling $676,578.59, which must be

[4] As noted above this number is likely only half of the actual time for recreated fees. See Page 8 *supra*.

deducted off the top, as such entries are clearly not recoverable.

Plaintiffs' remaining requested fees are further objectionable either because they are outside the scope of the Court's Order, duplicative, excessive, vague and/or block billed and should thus be fully disallowed. While it is impossible to ascertain the total dollar amount of plaintiffs' objectionable time entries due to plaintiffs' improper block billing, the Court need keep in mind that 80% of the total fees billed is properly objectionable for one or more of these reasons and should be disallowed completely. (See JT Exhibit, Ex. C). Should the Court not disallow these fees in their entirety, it should, in the first instance, apply a 30% reduction for plaintiffs' improper block billing practices. Thereafter, the Court should make the further appropriate reductions for each of plaintiffs' additional objectionable entries: beyond the scope, duplicative, excessive or vague.

Given the time and difficulty in reviewing each of the thousands of time entries and deciphering which part of the block billed time should be discounted, the Court may alternatively consider addressing these objections through an additional percentage reduction. Since the law allows a 30% reduction for block billing, because it presumes the time included is properly billed although likely inflated, the reduction for these clearly improper time entries should be even greater. As such, an additional reduction of at least 30% for plaintiffs' entries which are vague, excessive, duplicative or beyond the scope, would be quite conservative.

Plaintiffs are seeking $291,479.89 in costs. However, as shown above and demonstrated in JT Exhibit,

Ex. B., $231,259.78 are not recoverable. Accordingly, any costs award should be no more than $60,220.11.

The fees and costs sought by plaintiffs are plainly excessive. Plaintiffs' Fee Application does not conform to the mandatory requirements of LRCiv 54.2 and plaintiffs attempt to recover for clearly non-allowable fees and costs. As such, Plaintiffs' Fee Application should be denied or significantly reduced.

Dated: January 10, 2013

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

[Filed: 01/29/13]

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PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR APPLICATION FOR ATTORNEYS' FEES AND COSTS

Plaintiffs submit this combined reply in support of their application for attorneys' fees and costs [Doc. 1082] (the "Application") to address the objections raised in the separate responses of Goodyear and its former attorneys (collectively referred to herein as "Defendants"). [Doc. 1101-03]. As discussed in detail below, Defendants' objections have no merit, and this Court should award all the fees and costs documented in Plaintiffs' Application.

I. INTRODUCTION.

In their response to Plaintiffs' Application, Defendants continue to ignore the Court's reasoning and why the Court's decision to sanction Defendants is appropriate. When confronted with the sanction motion, Defendants attempted to deceive. When confronted with the Court's preliminary order, they doubled down on their deception. At the evidentiary hearing, they presented false testimony, apparently assuming there would be no further discovery (which the Court did allow, and which brought that additional fraudulent conduct to light). At no time have any of the Defendants displayed the slightest remorse or acknowledgement of wrongdoing. Consistent with this unrepentant attitude, Goodyear brazenly suggests

that the Court's decision to award all of Plaintiffs' fees and costs incurred after November 1, 2006, is "vindictive." [Doc. 1103 at 2, 4, 15].

As a result of the discovery of years of Defendants' misrepresentations and the fraudulent withholding of critical evidence, the sanctions which Plaintiffs sought included an award of fees for all the time their attorneys spent in this litigation, all litigation costs incurred throughout the litigation, unsealing of the record, and leave to file a supplemental pleading in this case to bring this matter to a quick conclusion with a jury trial based on the newly-discovered truth. In the exercise of its broad discretion, the Court declined to unseal the record, denied Plaintiffs leave to file a supplemental pleading,[1] and limited the monetary sanction to those fees and costs incurred "after Goodyear served its supplemental responses to Plaintiffs' First Request," concluding (with the benefit of the discovery of a long term history of fraudulent conduct) that was the date that Goodyear commenced its fraud and intent to evade its disclosure obligations. Rather than evidence vindictiveness, the Court's sanctions order was a measured, well-reasoned effort to address Defendants' overwhelming misconduct.

Defendants assert no argument whatsoever against the reasonableness of the billing rates used in

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[1] Ignoring this request and the Court's decision, Defendants suggest that Plaintiffs are seeking a post-settlement supplemental payment because "Plaintiffs don't want to reopen or try the case in lieu of the settlement they already accepted." [Doc. 1102 at 11]. However, Plaintiffs have already advised the Court they will affirm the settlement agreement and proceed as allowed against Defendants for fraud.

Plaintiffs' Application.[2] Instead, their arguments for reducing the amount of fees and costs which Plaintiffs request are limited to arguments that Plaintiffs' Application does not satisfy inapplicable procedural requirements and that certain categories of fees and costs are not recoverable. Significantly, Defendants do not suggest the slightest surprise regarding the total amount of fees and costs incurred during the seven years of this litigation, in which there have been more than 1,100 pleadings, tens of thousands of documents that were produced and analyzed, 33 witnesses deposed, and 1,087 exhibits listed for trial. Nor do Defendants dare to suggest that the total fees and costs Plaintiffs seek are excessive when compared to what they have incurred.[3] After all, no less than twelve attorneys have been working for Defendants (G.

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[2] Fennemore/Hancock merely asserts that Plaintiffs did not provide corroboration that $500 per hour was the prevailing rate in 2007. [Doc. 1102 at 11]. However, as explained in Plaintiffs' Application, the lodestar calculation is based on **current** prevailing rates, *see Missouri v. Jenkins*, 491 U.S. 274, 283 (1989), and Plaintiffs **do** provide substantial support for that rate. [Doc. 1082 at 3].

[3] Plaintiffs' counsel contacted Goodyear requesting copies of its bills from Roetzel & Andress and Fennemore Craig, so that Plaintiffs would be able to contrast for the Court the total hours incurred in representing Goodyear's interests in this matter with Plaintiffs' fees and costs. Goodyear refused. [*See Letters* (Exh. 1) attached hereto]. *See Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1574-75 (11th Cir. 1985) (holding that the number of hours spent on a case by defense counsel may be relevant to a determination of the reasonable fees to be awarded to plaintiff); *Democratic Party v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004) (comparison of fees is useful guide in evaluating appropriateness of time claimed); *Stansby v. Southern Bell Tel. & Tel. Co.*, 77 F.R.D. 662, 663-64 (D.N.C. 1978) (time opposing counsel spent to prepare its case is probative, because they worked on the same issues).

Hancock, S. Freeman, S. O, J. Condo, L. Coulter, B. Musnuff, G. Rooney, M. Harrison, J. Molinar, J. Okun, G. Brandon, and B. McQuaid).[4]

The Application presents the Court with more than adequate information for the Court to determine, in its discretion, the reasonableness of the Plaintiffs' attorneys' fees and costs for the sanctions period. Defendants attempt to reargue several settled points, and generally engage in a series of hypertechnical and unfounded arguments in an attempt to minimize the impact of their own abhorrent behavior. Accordingly, Plaintiffs' requested fees and costs should be awarded in their entirety.

II. LEGAL ANALYSIS.

A. Defendants Improperly Attempt to Re-Argue Issues Which this Court Has Already Decided.

Defendants attempt to re-argue several issues which this Court already resolved in the Court's extensive and well-reasoned sanctions order [Doc. 1073]. These issues were correctly decided the first time. Defendants are simply unhappy with the Court's decision to impose sanctions on them, which decision Goodyear suggests is "vindictive." [Doc. 1103 at 2, 4, 15]. However, a response to a fee application is not the appropriate time or place to re-argue foundational issues which this Court has already decided.

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[4] *Donahue v. Donahue*, 105 Cal. Rptr. 3d 723, 733 (2010) (the number of lawyers the other side used is an indication of the effort required).

1. The Court's Order appropriately awards all fees and costs Plaintiffs incurred after November 1, 2006.

The proper scope of the sanctions to be imposed on Defendants has already been the subject of extensive briefing since the Court issued its preliminary order in February 12, 2012. [Doc. 980, 983, 992, 999, 1000, 1001, 1003, 1043-46, 1064-69] After carefully weighing both sides' arguments, this Court found that Defendants' misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal," [Doc. 1073 at 56], and concluded that "the most appropriate sanction is to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request." [*Id.* at 51 (emphasis in original)].

Defendants now request that the Court reconsider its decision, claiming that $722,000 of fees and costs incurred during the relevant timeframe should be denied because – in Defendants' view – they were "not caused" by the conduct for which the Court issued sanctions. This argument is an improper motion for reconsideration which this Court should reject out of hand.

Furthermore, this argument should also be rejected because it is substantively erroneous. As this Court has correctly noted:

> In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the district court had relied on its inherent power and sanctioned NASCO a sum equal to "the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at

> 40. At the Supreme Court, Chambers challenged this amount by arguing "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong." *Id.* at 57. The Supreme Court rejected this argument, finding "the frequency and severity of Chambers' abuses of the judicial system" meant "[i]t was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* at 57. **This is a rejection of the position that only monetary harms incurred as a direct result of sanctionable conduct can be remedied.**

[Doc. 1973 at 54-55 (emphasis added)].

In this case, the Court made clear that "if these tests had been disclosed it would have been difficult if not impossible for Goodyear to claim the G159 was suitable for use on a motor home." [Doc. 970-1, at 13]. Thus, by withholding this critical evidence from the Court and counsel, Defendants converted this entire litigation into a meaningless charade, which required "an absurd expenditure of resources by Plaintiffs and the Court." [Doc. 1073 at 50]. This Court correctly noted that, "[i]n these circumstances, one could conclude practically all of Plaintiffs' fees and costs were due to misconduct (*i.e.*, the case would have been resolved in an easy and straightforward manner absent Goodyear's obstructionism),"[5] and that in light

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[5] In an effort to suggest otherwise, Goodyear asserts that *Schalmo* and *Woods* demonstrate that proper disclosure would not have impacted settlement. This is simply false. For example, Goodyear suggests that the concealed tests were ultimately disclosed in *Schalmo* and the case proceeded to trial. Goodyear

of the Defendants' "repeated egregious conduct . . . the Court must be free to fashion an appropriate remedy. The Court has done so." [*Id.* at 51, 65]. Thus, Defendants' causation argument has no merit.

Defendants similarly attempt to re-argue the Court's decision to award "*all* of the attorneys' fees and costs incurred" since November 1, 2006, based on an unsupported claim that there has not previously been a sanctions award as large as the amount requested in the Application. But even if it were true that the size of the Court's award is unprecedented, it is also true that the scope and egregiousness of Defendants' fraudulent conduct is also unprecedented in this District. When faced with this kind of exceptionally egregious misconduct, other courts have not hesitated to award **all** fees and costs, resulting in total awards that are as large as, or larger than, the amounts reflected in Plaintiffs' Application. *See, e.g., Chambers,* 501 U.S. at 40, 57 (affirming decision imposing sanctions of the entire amount of litigation costs incurred, in the amount of $996,644); *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 at *17 (S.D. Cal.

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does not explain why it went to trial and thus it may well have been plaintiff's decision. Regardless, it resulted in a $5.6 million verdict. More importantly, Goodyear fails to remind the Court of the **huge** difference between *Schalmo* and *Haeger*. Specifically, it was only in *Haeger* that Goodyear's expert and 30(b)(6) deponent admitted that the tire would foreseeably fail if it was exposed to prolonged temperatures in excess of 200°. These depositions were sealed and kept confidential, so that the jury, the plaintiffs and the court in *Schalmo* were never aware of the damning admissions which occurred in *Haeger*. Goodyear's reference to the *Woods* case is equally misleading. Again, the damning admissions of Goodyear's experts were concealed from the plaintiffs in *Woods*. Thus, reference to *Schalmo* and *Woods* in this context is classic Goodyear misdirection.

January 7, 2008) (awarding all attorneys' fees and costs incurred, in the amount of $8,568,633, for "monumental and intentional" discovery violations), *vacated in part on other grounds*, 2008 WL 638108 (S.D. Cal. March 5, 2008); *In re E.I. DuPont-Benlate Litigation*, 918 F. Supp. 1524, 1556-57 (M.D. Ga. 1995) (awarding all fees and costs, in the amount of $6,843,837, for discovery abuse which "made a mockery of the preparation for and conduct of that trial"), *rev'd on other grounds,* 99 F.3d 363 (11th Cir. 1996), *cert. denied*, 522 U.S. 906 (1997). Thus, Defendants' attempts to re-argue this Court's decision to award "all" fees and costs incurred since November 1, 2006, have no merit.

2. The Court has already determined that Mr. Hancock is responsible for 20% of Plaintiffs' fees and costs.

Fennemore Craig and Mr. Hancock further argue that any fees and costs allegedly unconnected to Mr. Hancock's misconduct, including all fees and costs prior to June of 2008, should not be allowed as against them. Again, as above, the Court has already taken into account Mr. Hancock's more limited role when it allocated only 20% of the overall award against Fennemore Craig and Mr. Hancock.

Mr. Hancock's misconduct is fully documented in the sanctions order. The Court found multiple intentional misrepresentations. The Court also found that "Mr. Hancock did not correct the record when he subsequently learned these other tests existed," and the litigation "continued for approximately twenty-two months" thereafter. [Doc. 1073 at 63]. Thus, the Court concluded, "while his culpability is reduced, it is not purged." [*Id.*]. The Court went on to hold: "Based on his relatively limited involvement, but in light of his

repeated misstatements and his failure to correct the record once he learned his representations were false, Mr. Hancock will be held responsible for twenty percent of those fees and costs." [*Id.* at 64]. Thus, the Court has already made a detailed review of Mr. Hancock's behavior and has decided to apportion only twenty percent of Plaintiffs' fees and costs against him. The argument raised by these parties in an attempt to further limit the sanctions against Mr. Hancock should be overruled.

3. The Court Has Already Ruled that Plaintiffs Fee Agreement Is Irrelevant to the Lodestar Analysis.

Defendants also attack Plaintiffs' Application on the ground that Plaintiffs did not provide a copy of their contingent fee agreement to the Court. However, the Court already addressed this issue, expressly stating that the amount of fees awarded in this case would be based on the lodestar method, not the Plaintiffs' contingent fee agreement:

> The Court recognizes that Plaintiffs might have a contingency agreement with their counsel. The amount of sanctions will be calculated pursuant to the lodestar method **and will not be limited to the amount paid by Plaintiffs as a percentage of the settlement**. *Cf. Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court may not rely on a contingency agreement to increase or decrease what it determines to be a reasonable attorney's fee.").

[Doc. 1073 at 51, n.23 (emphasis added)]. Accordingly, this Court has already ruled that Plaintiffs' fee

agreement is not relevant to the Court's determination of sanctions, and therefore Plaintiffs did not provide it. [Declaration of David Kurtz (Exh. 2) at ¶ 5].

Contrary to the Court's ruling, Fennemore Craig and Hancock nevertheless contend that the amount of fees awarded may not exceed the amount which Plaintiffs actually paid its counsel out of settlement proceeds. Otherwise, they contend, the award would go beyond compensating Plaintiffs, and would constitute punishment. Tellingly, they do not cite a single case in support of their assertion. Defendants are wrong.

The Supreme Court has explained that fee sanction awards for cases – like this one – of egregious misconduct have the dual purposes of both compensation and deterrence. *Chambers,* 501 U.S. at 45-46. Thus, (as this Court already determined) federal courts appropriately rely on the lodestar method, and are not limited to the amount of fees actually paid to counsel under a contingent fee agreement. Further Defendants do not deny that their wrongful conduct deprived Plaintiffs of the opportunity for a fair trial of their case on the merits. Thus, repayment of these expenses is, in fact, compensatory.

Moreover, if Goodyear's assertion were correct, then the Courts power to award sanctions in contingent fee cases would be almost completely eliminated. For example, if during pretrial proceedings a defendant in a contingent fee case violates the discovery rules or its counsel violates Rule 11, the court would be powerless to impose a fee sanction because, under Defendants' view, the plaintiff has not yet incurred any fee obligation, and will not unless and until the plaintiff succeeds in getting a judgment in its favor. *See Eriksen v. Dennett*, 2008 WL 54039 *1 (D. Utah Jan. 3, 2008)

("If this were the rule, in cases where plaintiff's counsel was retained on a contingent fee basis, defendants would be free to ignore discovery responsibilities without fear of monetary sanction."); *Mackler Productions, Inc. v. Turtle Bay Apparel Corp.*, 153 F. Supp. 2d 504, 510-11 (S.D.N.Y. 2001) (rejecting sanctioned attorney's argument that the plaintiff suffered no damages by his misconduct, and therefore was not entitled to compensatory sanctions, "because plaintiff had a contingency fee agreement with its attorney").

Furthermore, under Defendants' erroneous argument, the more effective a defendant's misconduct is, the greater the defendant's insulation from a fee sanction. For example, if the defendant engages in a pattern of discovery fraud that is so egregious that it causes the plaintiff to recover nothing in the final judgment, then under Defendants' view any award of fee sanctions would be improper because it would exceed the amount of fees the plaintiff was obligated to pay (zero).

Thus, Goodyear's interpretation would reward misconduct while retarding the inherent powers of the courts. Fortunately, that is not the law.

B. Defendants' Reliance on LRCiv 54.2 Is Misplaced.

Most of Defendants' objections to Plaintiffs' Application are based on alleged non-compliance with LRCiv 54.2. However, that rule – by its own terms – does not apply to attorneys fees and costs awarded as sanctions, as in this case: "This Local Rule does not apply . . . to claims for attorneys' fees or related expenses for violations of the Federal Rules of Civil Procedure or under 20 U.S.C. § 1927." LRCiv 54.2(a).

Here, the Court's award of fees and costs is expressly based on § 1927 and the Court's inherent power to impose sanctions, arising out of, among other things, a stream of willful violations of the Federal Rules of Civil Procedure.[6]

Although the Court's inherent power to impose sanctions is not specifically referenced in LRCiv 54.2(a), fee applications pursuant to such power are nevertheless exempt from the rule's normal requirements. The exemption for sanctions-based applications in LRCiv 54.2(a) is based on FRCP Rule 54(d)(2)(E), which similarly states: "Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927." *See Gobbo Farms & Orchards v. Poole Chemical Co.*, 81 F.3d 122, 123 (10th Cir. 1996) (Rule 54(d)(2)(E) makes awards "in the nature of a sanction" exempt from the "normal limitations on recovery of costs"; allowing recovery of "investigative expenses defendant incurred in preparing to defend against an unmeritorious claim"). Simply stated, attorney fee applications for sanctions awards have never been required to be documented as contemplated by the Local Rules for fee claims allowed by statute or contract.

Moreover, courts routinely construe the exemption in Rule 54(d)(2)(E) as applying to sanctions under inherent powers. *See, e.g., Plaskon v. Public Hosp. Dist. No. 1*, 2008 WL 249019 at *1 (holding that Rule

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[6] Defendants falsely assert that this Court clearly stated in its Sanctions Order that LRCiv 54.2 applies here. To the contrary, the order required Plaintiffs to file their application for fees and costs "as required by Local Rule." [Doc. 1073 at 66]. Because LRCiv 54.2 explicitly does not apply here, by its own terms, compliance with it was not required.

54(d)(2)(E) made a request for sanctions pursuant to the court's inherent authority exempt from the timing requirement of Rule 54(b)); *Royal Surplus Lines Ins. Co. v. Coachman Industries, Inc.*, 229 F.R.D. 695, 696 (M.D. Fla. 2005) (finding that an application for fees pursuant to court's inherent powers is exempted by Rule 54(d)(2)(E) because a fee application pursuant to inherent powers "is akin to a motion pursuant to Rule 11"). Defendants offer no authority to the contrary.

Accordingly, Defendants' objections based on alleged non-compliance with LRCiv 54.2 have no merit and must be rejected.

C. Defendants' Various Objections to Plaintiffs' Time Entries Should Be Rejected.

1. The time entries which Mr. Kurtz recreated based on the undisputed record are both reasonable and understated.

Plaintiff's counsel, David Kurtz, quite candidly brought to the Court's attention that he ceased keeping contemporaneous time records for this litigation for a brief period of time. Specifically, this period was from September of 2009 (six years after he was retained and after the first trial setting was vacated) through December 2010. Thus, in order to comply with the Court's order to identify fees and costs incurred subsequent to November 1, 2006, Mr. Kurtz reviewed the pleadings, correspondence and other documents contained in Plaintiffs' file. Based on that review, Mr. Kurtz very conservatively recreated just a small portion of the services actually rendered during that time period. Indeed, although this sixteen-month period includes all time necessary to fully prepare this case for trial, Mr. Kurtz's recreated time entries for this period total only 292 hours.

Defendants do not suggest that the scope of such services could be completed in just 292 hours. Their silence is a telling admission that the time billed for these services is completely reasonable. Moreover, none of the Defendants take issue with the Declarations attached to the Application, which set forth the underestimated nature of the time actually incurred and the countless hours of omitted services for which there was simply no record and thus no submittal.[7] Furthermore, during this timeframe, the Court was able to observe counsel's work at hearings, in filings, and in preparation for trial as an additional validation of the time incurred. *See Cruz v. Beto,* 453 F. Supp. 905, 907 (S.D. Tex. 1977), *aff'd* 603 F.2d 1178 (5th Cir.1979) (estimates of time suffice where Court had observed counsel's work and where Court had become "intimately familiar with this litigation during the past few years and the demands placed upon plaintiffs' counsel prior to trial stemming from defendants' tactical strategies").

Defendants nevertheless argue that all of the time entries which Mr. Kurtz recreated (totaling $146,550) should not be awarded to Plaintiffs, merely because they were recreated. Their argument has no merit.

As an initial matter, Defendants' argument ignores the reality that this litigation asserts tort causes of action in a contingent fee context. The recovery of

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[7] Plaintiffs' counsel have submitted detailed declarations reflecting the exercise of billing judgment. They fully support that the time documented significantly underestimates the time spent in representing the Plaintiffs' interests in this matter. Further, the bills submitted reflect the regular exercise of billing judgment and "no charge" entries for varied services, providing further support for the underestimated nature of the total time commitment in this almost seven-year ordeal.

attorneys' fees is generally not an issue in that context, and there is no requirement that contemporaneous time records be kept. *Cf. Frevach Land Co. v. Multnomah County, Dept of Envtl. Servs., Land Use Planning Div.*, 2001 WL 34039133 at *10 (D. Or. Dec. 18, 2001) (requiring contemporaneous time records "[i]f prevailing parties intend to seek attorney's fees") (cited by Defendants (Doc. 1102 at 2)). In *Mackler Productions, Inc. v. Turtle Bay Apparel Corp.*, 153 F. Supp. 2d 504 (S.D.N.Y. 2001), the court imposed a sanction of $45,000 against an attorney who caused a witness to present false evidence. Even though plaintiff's counsel did not have contemporaneous time records, the court held: "[T]he absence of such records is understandable as the case was litigated on a contingency fee basis." *Id.* at 509.

Here, it is fortuitous that Plaintiffs' counsel actually kept detailed time records for the vast majority of this case (which have been submitted to the Court). Those records were not kept for purposes of pursuit of our fee award. Rather, Mr. Kurtz kept track of his time consistent with his historical practices in order to monitor the efficiency of and productivity of contingency case file handling. [Declaration of David Kurtz (Exh. 2) at ¶¶ 3-4].

The cases cited by Defendants regarding discounting fees for the failure to comply with a specified duty to create contemporaneous billing records are inapplicable. As explained above, this was a contingent fee case in which a small portion of the time was carefully reconstructed, assuring it was underestimated so that no such objection could be expressed in good faith. The objections voiced by Defendants reflect no more than an anxious endeavor to find any reason to object to any particular time entry. For instance, when the Court

reviews the approximately $146,000 of recreated time, it will note that Defendants objected on 45 separate occasions to Plaintiffs' recreation of time expended where Plaintiffs exercised billing judgment and entered "no charge" for identified services. The objection to dozens of entries for which no charges were submitted is telling evidence that the objections were simply voiced for the purpose of objecting and are neither instructive nor designed to assist the Court in its analysis of the fees identified in compliance with the Court's order.

The robotic and thoughtless nature of the objections is evident throughout Defendants' joint exhibit. That is hardly helpful to the Court's analysis of this unexpected task. Thus, Defendants have largely engaged in non-specific "block objecting" and have essentially said to the Court "here are the general grounds for objecting, it is up to you to wade through the time entries to assess the applicability of these objections." The Court is not compelled to do the work which Defendants chose not to do. *See City of Prescott v. Town of Chino Valley,* 163 Ariz. 608, 623, 790 P.2d 263, 278 (Ariz. App. 1989), *aff'd in part, vacated in part,* 166 Ariz. 480, 803 P.2d 891 (Ariz. 1990) (parties involved in fee applications should "do more than dump a mound of paperwork on the Court with a here, you figure it out attitude.").

2. *Defendants' objections to "block billing" have no merit.*

Defendants object to over 60% ($1,611,044) of the fees Plaintiffs request on the ground that LRCiv 54.2 prohibits all block-billed time. As discussed above, LRCiv. 54.2 does not apply in this context, and therefore this objection has no merit.

But even if LRCiv. 54.2 did apply, Defendants' objection would still be unpersuasive. Significantly, Defendants do not claim that the services described in the time entries which they challenge as block-billed were not provided, that they were unnecessary or that the aggregated time is excessive. Instead, their objection is simply that the time was block billed.

Contrary to Defendants' argument, there is no per se requirement that the Court exclude any block-billed time. So long as the Court may assess the reasonableness of the fees being requested, a block-billing objection is not well taken. *See Parker v. Vulcan Materials Co. Long Term Disability Plan,* 2012 WL 843623 (C.D. Cal. Feb. 16, 2012) at *5 (overruling block billing objection because sufficient detail provided to allow Court to assess reasonableness); *Campbell v. National Passenger RR Corp,* 718 F. Supp. 2d 1093 (N.D. Cal. 2010) (no reduction for block billing, as entries identified "as block-billed are detailed enough for the Court to assess the reasonableness of the hours billed"); *Sunstone Behavioral Health, Inc. v. Alameda Cty. Medical Ctr.,* 646 F. Supp. 2d 1206, 1213-14 (E.D. Cal. 2009) (finding time entries reasonable despite block billing).

This is particularly true here because (as discussed above) the time records of Plaintiffs' counsel in this contingent fee litigation were not kept in anticipation of making a claim for attorneys' fees. The Local Rules did not require Plaintiffs to keep contemporaneous time records in a case where fees were not being pursued as a matter of statute or contract. Nevertheless Plaintiffs' time entries are accurately recorded and provide sufficient information for this Court to assess their reasonableness. Moreover, Plaintiffs' time records and fees have been reviewed by

three disinterested attorneys who expressed their opinions as to the propriety of the time incurred for the services described. Defendants offer nothing to contradict this evidence, and there is sufficient detail in the time entries for the Court to verify for itself that the services provided and the time charges were necessary and reasonable. Finally, because the very purpose of Mr. Kurtz's timekeeping was to assess efficiency and productivity, there would be no reason to ever inflate the total time spent on any given case, as Defendants imply.[8]

Having no obligation to keep time records at all, Plaintiffs should not be punished for not complying with an inapplicable local rule. More importantly, in this context, Defendants should not be allowed to evade the sanction which the Court has already determined to be appropriate for their misconduct.

3. Defendants' objections to alleged duplication are unfounded.

Next, Defendants object to time entries totaling $223,557 on the ground that the time entries reflect multiple timekeepers performing the same task. The declarations submitted by Plaintiffs' counsel describe the nature of services provided by each of the attorneys and their distinct roles in this case. Eighty percent of the legal work was done by one lawyer. The rest of the legal services were delegated in a

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[8] Goodyear wrongly suggest that all Mr. Kurtz's time after September 2011 was recreated, referring to a November 13, 2012 time entry which states: "Draft time records since January 1, 2011." However, the time records were maintained in handwriting on daily timesheets. Thus, the time entry refers to time expended to dictate the records so they could be added to Plaintiffs' Application. [Exh. 2 at ¶ 4].

thoughtful deployment to cost-effectively service the clients' needs. Accordingly, Defendants' objection of duplication has no merit.

Defendants' objection is merely general in nature and inadequate to be of benefit to the exercise of this Court's discretion. Having more than one attorney at a deposition or hearing, or drafting a motion is often necessary and prudent. Defendants make no attempt to explain why having more than one attorney work on a task was inappropriate, or why any specific time entry should be excluded from the Court's calculation of sanctions against Defendants.[9] This objection is particularly ironic, considering the small army of attorneys working for Defendants. Moreover, Defendants' general and vague objection is not adequate and provides no basis for a discretionary reduction of the fees. *See Sunstone*, 646 F. Supp. 2d at 1214 (*citing Moreno v. City of Sacramento*, 534 F. 3d 1106, 1113 (9th Cir. 2008) ("Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive . . .")).

Defendants provide no meaningful assistance to the Court to understand the basis for their objection or to exercise its discretion. Instead, Defendants have simply placed an "E" adjacent to a number of time entries, apparently hoping that the Court will do what Defendants could not.

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[9] Defendants complain of duplication because Mr. O'Connor and Mr. Kurtz both prepared for pretrial conferences and the evidentiary hearing. However, both attorneys extensively participated in each activity, and preparation was necessary and appropriate.

Furthermore, if the Court were to take the time to examine the details, it would see that several of the time entries for which Defendants objected based on duplication actually did not involve multiple timekeepers performing the same task. For example, Defendants object to 1.8 hours Mr. Kurtz spent on September 21, 2009, for "receipt and review of transcript of proceedings re pretrial conference held on 9/11/2009" on the ground that it is duplicative. However, there is no corresponding charge for such services in the Jennings Strouss time records.

Moreover, the deductions demanded are clearly inappropriate. For example, Defendants object to the following time entries as duplicative:

> 4/23/2012: D. Kurtz - Multiple emails re deposition issues and production issues; Telephone conference with Molinar x 2 re Taylor deposition; telephone to Condo re missing documents from Fennemore Craig; multiple emails with O'Connor re discovery strategy issues; Review full file outline to list issues to address with Taylor during depositions; Pull study of tire development publications re design and testing; begin outline of three volumes of Olsen depositions to select question and answers for witness control during impeachment depositions - 9.1 - $4,550
>
> 4/23/12: M. O'Connor - Multiple calls with David Kurtz; Telecon John Egbert re status and pleadings - .5 - $222.50

In this example, Defendants invite the Court to write off the full 9.1 hours of Mr. Kurtz' time and the full .5 hours of Mr. O'Connor's time for duplication and

excessive billings when it is readily apparent that the communications between attorneys represents, at most, a half hour of the total time charged that day. Of course, such strategic consultations are appropriate in any event. Regardless, rather than asking the Court to deduct $222.50, Defendants invite the Court to write off $4,772.50, without justification. *They do the same thing every time they object based on claims of duplication or excessive fees*, managing to compile $599,329 of such objections [Doc. 1103, p. 13]. This is just more evidence of Defendants' bad faith, as the total time billed by Jennings, Strouss & Salmon, spanning five years, was only $502,496.

Defendants had the opportunity to express thoughtful objections. If they thought the time spent on a given task was excessive, they should specify the amount of time which was excessive and the reason why. They did neither. The same is true of Defendants' random claims of duplication. This kind of knee-jerk objection is of no value to the Court. If Defendants cannot explain "why" and "how much," the Court should not be tasked with speculating about values which Defendants chose not to provide.

4. Defendants' objection for alleged clerical work is unfounded.

Next, Defendants claim that the sanction against them should be reduced by $491,484 because the time entries were for mere clerical work. This objection is unfounded.

First, Defendants' characterization of some of the time entries as clerical work is plainly wrong. For example, in the time records of Jennings Strouss, Defendants characterize time entries for John Egbert on 3/30/12, 4/5/12 and 4/6/12 as clerical. Each of these

involves discussions of database searches. At this time, Goodyear was resisting Plaintiffs' discovery efforts by asserting that the searches of Goodyear's database that Plaintiffs had requested either were not possible within certain timeframes or were unduly burdensome. Brian LeBanc, who is referenced in these time entries, is an IT expert with whom Plaintiffs' counsel consulted to determine that Goodyear's assertions were unfounded.

Second, even if one of the tasks listed in a time entry were clerical in nature, that certainly does not justify deducting the entirety of all services listed in the time entry, as Defendants demand. But that is the kind of imprecise and improper analysis Defendants have provided the Court. The Court is not required to labor through the hundreds of pages of billing entries to assess the propriety of Defendants' claims of clerical service, when they chose to not analyze those time entries in good faith.

Finally, the Court should reject this objection completely because the sanction against Defendants requires them to pay *"all"* costs Plaintiffs' incurred after November 1, 2006. As discussed *infra* at § (C)(6), "costs" are not limited to "taxable costs," and a sanctions award may appropriately include such non-taxable expenses as paralegals and others performing clerical tasks in furtherance of the litigation. Such expenses were just as wasted by Defendants' gross misconduct as any others Plaintiffs incurred.

5. *Defendants' objection to fees related to the preparation of Plaintiffs' Application has no merit.*

Defendants object to fees and costs associated with the preparation of pleadings and exhibits relating to

the fee application. The Court has already ruled that Defendants are to pay for all fees and costs since November 1, 2006. Thus, this expenditure is part of that continuum of expense that should have been unnecessary. The idea that Defendants should evade responsibility for these fees is misplaced and would serve only as a reward to Defendants for prohibited actions. Moreover, fees incurred working on the fee application are compensable. *See Clark v. City of Los Angeles,* 803 F.2d 987, 992 (9th Cir. 1986) (fees compensable under 42 U.S.C. § 1988); *IMA North America, Inc. v. Marlyn Nutraceuticals, Inc.*, 2007 WL 3231976 (D. Ariz. Oct. 31, 2007) (time spent preparing fee application is compensable in sanctions context). Surely, the time needed to establish the amount of fees and costs should be compensable here because it is another direct by-product of the egregious bad faith conduct detailed in the sanctions order. After all, no one would be burdened with these preparatory endeavors, but for Defendants' fraudulent misconduct.

6. Defendants' objection to "non-taxable costs" has no merit.

The sanctions order holds that Defendants' sanction includes all of Plaintiffs' "costs." Defendants' argument that Plaintiffs' recovery is limited to only "taxable costs" should be overruled. *See Gobbo,* 81 F.3d at 123 (overruling objection to award of "investigative expenses" as sanction for unmeritorious claim).

This Court clearly has the power to impose the sanction of requiring Defendants to pay "all" the costs Plaintiffs incurred. *Chambers*, 501 U.S. at 40, 57 (sanction requiring payment of entire amount of litigation costs). Further, outside the sanctions setting, recovery by a party of non-taxable costs is allowed for any "out-of-pocket expenses incurred by an

attorney which would normally be charged to a fee paying client." *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1217 n. 7 (9th Cir. 1986); *accord Grove v. Wells Fargo Fin. Calif., Inc.*, 606 F.3d 577, 581 (9th Cir. 2010). This includes computerized research, *Trustees of the Construction Industry v. Redland Ins. Co.,* 460 F.3d 1253, 1258-59 (9th Cir. 2006); travel in connection with case, *Davis v. Mason County,* 927 F.2d 1473, 1488 (9th Cir. 1991) (superseded by statute on other grounds); photocopying and long distance phone calls, *Snell v. Reno Hilton Resort,* 930 F. Supp. 1428, 1434 (D. Nev. 1996); PACER charges, *Shakey's USA, Inc. v. Tutto's Pizza Corp.,* 2009 WL 3211027 at *6 (E.D. Cal. Sept. 30, 2009); delivery of documents, *Graves v. Arpaio,* 633 F. Supp. 2d 834, 851-52 (D. Ariz. 2009); and hearing transcripts, *Adidas Am. Inc. v. Payless Shoe Source, Inc.,* 2009 WL 302246, at *3 (D. Or. Feb. 9, 2009).

Defendants also object to the absence of invoices for the various cost expenditures identified in accord with the Court's order, knowing full well they represent actual expenditures. Provided with this Reply are the documents supporting the cost expended, in the amount of $254,092.56 on behalf of The Kurtz Law Firm. [Kurtz Dec. (Exh. 2) at ¶¶ 6-9 and Exh. 3]. Also provided are the documents supporting all the costs expended by Jennings, Strouss in the amount of $32,466.60.[10] [Declaration of John J. Egbert attached hereto as Exh. 4].

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[10] The only exception to documented costs are those associated with copying expenses incurred by both firms. Like all firms, The Kurtz Law Firm and Jennings, Strouss & Salmon record the number of pages of documents copied during the course of litigation in order to be recompensed by clients for those charges. Both firms charge 20¢ per page, as is customary in the Phoenix

The Court properly awarded Plaintiffs all of their costs incurred during the sanctions period. These costs have been fully documented. The objections to the costs should be overruled.

III. CONCLUSION

Defendants' conduct "stemmed from a deliberate corporate strategy adopted by Goodyear to prevent disclosure" of critical test data. (Doc. 970-1 at 15). The strategy involved "clear and repetitive" deceptive acts, including during the evidentiary hearing. The conduct defeated any notion of a fair trial or settlement based on the actual facts. The conduct defiled the court system and defeated its purpose. The Court's sanctions award is appropriately crafted to address unprecedented misconduct for which there is no excuse.

Plaintiffs have filed documentation that is more than sufficient to allow the Court to find that the documented fees and costs are reasonable, and enter its award in response to the egregious conduct of Goodyear and its counsel. Defendants' objections are not well taken and should be overruled, and the Application granted.

RESPECTFULLY SUBMITTED this 29th day of January, 2013.

THE KURTZ LAW FIRM

By: */s/ David L. Kurtz*

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metropolitan market for similar services. The 20¢ copy charge is designed to defray expenses associated with the reproduction process. Other than "copy counts," neither firm maintains any separate record which would "describe" copies.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: 06/26/13]

No. CV-05-02046-PHX-ROS

LEROY HAEGER, *et al.*,

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER CO., *et al.*,

Defendants.

ORDER

On November 8, 2012, the Court sanctioned Graeme Hancock, Basil Musnuff, and Goodyear Tire and Rubber Co. ("Goodyear") based on repeated misconduct during discovery. The amount of sanctions was set as the "fees and costs incurred after Goodyear served its supplemental responses to Plaintiffs' First Request" for Production of Documents in September 2006. (Doc. 1073 at 64). Because the fees and costs were being awarded as a sanction, Local Rule 54.2 regarding attorneys' fees requests did not automatically apply. Out of an abundance of caution, however, and to give Mr. Hancock, Mr. Musnuff, and Goodyear an opportunity to object, the Court directed Plaintiffs to submit the documentation contemplated by Local Rule 54.2. Having reviewed that documentation, the Court issues the following order.

I. Background

The Court will not recount in detail the misconduct that served as the basis for sanctioning Mr. Hancock, Mr. Musnuff, and Goodyear. In short, sanctions were necessary because "Goodyear and its attorneys adopted a strategy . . . to resist all legitimate discovery, withhold *obviously* responsive documents, allow Plaintiffs and their experts to operate under erroneous facts, disclose small subsets of documents as late as possible" and otherwise attempt to frustrate the administration of justice. (Doc. 1073 at 65). The latest briefs from Goodyear and its attorneys contain a number of arguments that are, in effect, requests for the Court to reconsider its prior findings. There is no basis to revisit most of those arguments. The only argument worthy of additional discussion involves the alleged absence of a direct causal relationship between the misconduct and the fees and costs awarded by the Court.

Given the breadth of the misconduct in this case, it would be exceptionally difficult to link each instance of misconduct with the harm that misconduct caused. When attorneys make repeated misrepresentations in court, a 30(b)(6) witness repeatedly makes misrepresentations during his deposition, and expert witnesses are knowingly misled, a court must have some ability to provide relief. The Court previously concluded it would be appropriate to shift all the fees and costs incurred after it became clear that Goodyear and its attorneys were not acting in good faith. The Court recognizes, however, that Ninth Circuit authority might be read as limiting an award of sanctions to the harm *directly* caused by the misconduct. *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011). Therefore, to prevent the need for

future proceedings, the award of fees and costs will include an alternative amount of the fees and costs incurred as a direct result of sanctionable conduct.

Regardless of whether the Court awards *all* the fees and costs after September 2006 or only a much smaller subset, it now appears that an inordinately complicated accounting will be required. Therefore, the parties will be instructed to meet and confer in an attempt to agree regarding the appropriate size of the Court's award. If they are unable to agree, the Court will appoint a special master to conduct the accounting. The Court offers the following in hopes of guiding the parties' discussions.

II. Determining the Amount of Attorneys' Fees

The Court previously indicated it would utilize the lodestar method for calculating the amount of fees. (Doc. 1073 at 51 n.23). That method consists of "multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (quotation omitted). Once that calculation is made, the Court "may then adjust the figure upward or downward taking into consideration twelve reasonableness factors." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 n.11 (9th Cir. 2012) (quotation omitted).

A. Reasonable Hourly Rates

Plaintiffs seek the following hourly rates:

Individual	Hourly Rate
David L. Kurtz (attorney)	$500
Kerry Chrisman (paralegal)	$165
Michael O'Connor (attorney)	$445
John J. Egbert (attorney)	$425
Paul G. Johnson (attorney)	$365
Garrett Olexa (attorney)	$345
Peter Donovan (attorney)	$180
Michele Maser (paralegal)	$195
Mary Muchmore Hogue (paralegal)	$165
James Abernethy (attorney)	$400

Goodyear and its attorneys do not object to any of these hourly rates as unreasonable. Based on the evidence submitted by Plaintiffs, the Court finds these fees reflect the prevailing hourly rate in Phoenix for lawyers of reasonably comparable skill, experience, and reputation working on matters of this type. Therefore, any calculation of the lodestar will be based on these hourly rates.[1]

B. Hours Reasonably Expended

According to the time records submitted by Plaintiffs' counsel, lead counsel David Kurtz spent approximately 3,700 hours on this case during the

[1] Goodyear and its attorneys objected that these rates might not have been the prevailing rate at the time the services were performed. But this objection is foreclosed by Supreme Court authority. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (allowing for application of current rates).

relevant time while a paralegal at his firm spent approximately 1,000 hours. The attorneys and paralegals at Jennings, Strouss & Salmon, P.L.C. spent approximately 1,200 hours. And attorney James Abernethy spent approximately 120 hours. Goodyear and its attorneys object to these figures, claiming the absolute maximum the Court could find reasonable is approximately 800 hours by Mr. Kurtz and his paralegal, a little over 500 hours from all the staff at Jennings, Strouss & Salmon, and no hours from Mr. Abernethy.

The difference between the parties' calculations for the reasonable amount of time spent on this litigation is approximately 4,600 hours. Based on the Court's familiarity with the case, and its participation throughout the litigation, the hours submitted by Plaintiffs appear more reasonable than those proposed by Goodyear and its attorneys. But the Court is not yet prepared to definitively resolve the reasonable number of hours. Instead, the parties will be instructed to attempt to reach settlement on two figures. First, the reasonable number of hours incurred after September 2006. Second, the reasonable number of hours directly attributable to the sanctionable conduct identified in the sanctions order. If the parties are able to reach agreement on these two figures, the Court will adopt the parties' agreement, awarding the higher figure but also deeming the lower figure an appropriate alternative in the event the sanctions must be so limited.

If the parties are unable to reach agreement on the number of hours reasonably expended, the appointment of a special master appears appropriate. Fed. R. Civ. P. 53. That special master would be tasked with preparing a report on the appropriate lodestar

regarding attorneys' fees. *See, e.g., Agostino v. Quest Diagnostics, Inc.*, 2012 WL 2344865 (D.N.J. June 20, 2012) (appointing special master to prepare report on attorneys' fees dispute). At present, the Court is inclined to require the parties split the cost of a special master equally but the special master would be instructed to submit a recommendation regarding the final allocation of the costs associated with his or her service.

Pursuant to Federal Rule of Civil Procedure 53, the Court can appoint a master only after giving "the parties notice and an opportunity to be heard." Fed. R. Civ. P. 53(b)(1). Therefore, if the parties cannot reach an agreement on the amount of attorneys' fees, the parties will be ordered to file a joint statement setting forth their position on the following issues: whether appointment of a special master is warranted; how the costs of the special master should be allocated; and the names of three agreed upon individuals qualified to serve. Each interested party will be allowed three pages.

III. Determining Appropriate Costs'

As with the amount of attorneys' fees, the parties also present very different views regarding the appropriate amount of costs to award. Goodyear and its attorneys argue that the Court should award only those costs that qualify as "taxable" under 28 U.S.C. § 1920. It is unclear why Goodyear and its attorneys believe the award of costs must be so limited. And the award cannot be so limited.

The Ninth Circuit has "repeatedly . . . allowed prevailing plaintiffs to recover nontaxable costs where statutes authorize attorney's fees awards to prevailing

parties."[2] *Grove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 580 (9th Cir. 2010). In the specific context of sanctions, the Supreme Court has held a court may award "the entire amount of . . . litigation costs paid to . . . attorneys." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 40 (1991). Therefore, there is no bar to awarding Plaintiffs their taxable and non-taxable costs.

Again, the parties will be instructed to attempt to agree regarding costs. As with the attorneys' fees, there should be an attempt to agree on the costs incurred after September 2006 as well as the costs incurred as a result of the sanctionable conduct. If they cannot agree, the special master will be tasked with conducting an accounting.[3]

IV. Motions for Clarification

There are two pending requests for clarification. First, Goodyear seeks clarification that the additional information submitted by Spartan Motors, Inc. (Doc. 1083) will not be addressed at this time because of the pending appeal. The additional evidence is a motion for reconsideration regarding the portion of the sanctions order addressed to Spartan's request for sanctions against Goodyear. Because the sanctions order regarding Goodyear is currently on appeal, the Court will not address Spartan's additional evidence at this time.

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[2] The prevailing practice in Phoenix is to bill costs separate from an attorneys' hourly rate. *Agster v. Maricopa County*, 486 F. Supp. 2d 1005, 1022 (D. Ariz. 2007).

[3] David Kurtz admits he was unable to locate supporting documents for eleven cost items, totaling $4,880.73 (Doc. 1112-1 at 8-9). Those costs will not be awarded.

The second request for clarification comes from Plaintiffs. In the sanctions order, the Court apportioned twenty percent of the fees and costs to Mr. Hancock and the remaining eighty percent to Mr. Musnuff and Goodyear. (Doc. 1073 at 64). Plaintiffs now seek clarification on whether the Court intended to impose joint and several liability on Mr. Hancock, Mr. Musnuff, and Goodyear. Goodyear and its attorneys object to the Court addressing this issue given that Goodyear's appeal is pending. Out of an abundance of caution, the Court will defer ruling on this issue until the Ninth Circuit issues the mandate.

V. Attorney Client Privilege

During the sanctions proceedings, Goodyear and its attorneys attempted to justify their behavior by disclosing certain information that might have been subject to the attorney-client privilege. Given that context, the disclosures will be considered a waiver of the privilege. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield.").

Accordingly,

IT IS ORDERED the Motion for Attorney Fees and Costs (Doc. 1082) is GRANTED IN PART as set forth above.

IT IS FURTHER ORDERED no later than July 19, 2013 the interested parties shall meet and confer regarding the appropriate amount of attorneys' fees and costs. If they are able to reach agreement, no later than July 22, 2013 the parties shall file a joint statement identifying the appropriate amount of attorneys' fees and costs incurred after September

2006 as well as the attorneys' fees and costs incurred as a direct result of the sanctionable conduct.

IT IS FURTHER ORDERED if the parties cannot agree on the appropriate amount of attorneys' fees and costs, no later than July 26, 2013 they shall file a joint statement of no more than three pages per party with each party setting forth: whether appointment of a special master is warranted and how the costs of the special master should be allocated. The parties should also jointly identify three individuals qualified to serve.

IT IS FURTHER ORDERED the Motion for Clarification (Doc. 1089) is GRANTED.

IT IS FURTHER ORDERED the Motion for Clarification (Doc. 1114) is DENIED WITHOUT PREJUDICE. Plaintiffs should renew their request, if appropriate, within ten days of the mandate being issued.

DATED this 26th day of June, 2013.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

[Filed: 08/26/13]

No. CV-05-2046-PHX-ROS

LEROY HAEGER, *et al.*

Plaintiffs,

vs.

GOODYEAR TIRE AND RUBBER COMPANY, *et al.*,

Defendants.

JUDGMENT ON ATTORNEYS FEES

IT IS ORDERED AND ADJUDGED Pursuant to the Order filed August 26, 2013, judgment is entered in favor of Plaintiffs and against Graeme Hancock in the amount of $548,240.23 and against Basil J. Musnuff and the Goodyear Tire and Rubber Company in the amount of $2,192,960.93.

JUDGMENT ENTERED THIS 26th day August, 2013.

BRIAN D. KARTH
District Court Executive/Clerk

s/ L. Dixon
Deputy Clerk

RECORD
AND
BRIEFS

No. 15-1406

IN THE

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *ET. AL*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Is a federal court required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct when the court does not afford sanctioned parties the protections of criminal due process?

LIST OF PARTIES

Petitioner The Goodyear Tire & Rubber Company ("Goodyear") was an appellant in the Ninth Circuit proceedings, and a defendant and sanctionee in the District of Arizona. Fennemore Craig, P.C., Graeme Hancock, and Basil Musnuff were also appellants in the court of appeals and sanctioned by the district court. These latter individuals and entity have now settled with Plaintiffs.

Goodyear, Spartan Motors, Inc., and Gulfstream Coach, Inc. were defendants in the district court and the Maricopa County Superior Court.

Leroy Haeger, Donna Haeger, Barry Haeger, and Suzanne Haeger, Respondents in this case, were appellees in the Ninth Circuit proceedings, and plaintiffs in the proceedings before the district court and the Maricopa County Superior Court.

RULE 29.6 STATEMENT

Petitioner Goodyear has no parent company and no publicly-held corporation owns 10 percent or more of Petitioner's common stock.

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OPINIONS BELOW

The original Ninth Circuit opinion is reported at 793 F.3d 1122 (9th Cir. 2015), and the panel opinion as amended (Pet. App. 1a-50a) is reported at 813 F.3d 1233 (9th Cir. 2016). The order of the Ninth Circuit denying rehearing and rehearing en banc (Pet. App. 5a-6a) is available at 2016 U.S. App. Lexis 2722 (9th Cir. Feb. 16, 2016).

The proposed order of the District of Arizona finding grounds for sanctions (Pet. App. 51a-82a) is unreported but publicly available on PACER, and the decision imposing sanctions (Pet. App. 83a-172a) is reported at 906 F. Supp. 2d 938 (D. Ariz. 2012). The court's decision allocating costs and fees (Pet. App. 173a-196a) is available at 2013 U.S. Dist. LEXIS 189796 (D. Ariz. Aug. 26, 2013).

JURISDICTIONAL STATEMENT

The Ninth Circuit denied Goodyear's petition for rehearing on February 16, 2016 in conjunction with the issuance of its amended opinion. Pet. App. 5-6a. A timely Petition followed on May 16, 2016, and this Court granted *certiorari* on September 29, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the federally-recognized "inherent authority" of a court to impose sanctions and the constitutional separation of powers and due process restraints upon such authority. U.S. CONST. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law[.]").

STATEMENT

In this case, the district court, invoking its inherent power, issued a $2.7 million sanction—the largest ever in the District of Arizona and one of the largest ever imposed pursuant to a court's inherent power—against Goodyear and its outside counsel.

A. Background on the Underlying Litigation

The sanctions proceedings stem from certain documents that were not produced during the course of discovery in the underlying litigation. The document featured most prominently by Plaintiffs was a "Heat Rise" test relating to an allegedly defective Goodyear tire.

Plaintiffs Leroy, Donna, Barry, and Suzanne Haeger sued Goodyear and others in Arizona state court in June 2005 (subsequently removed), claiming that a defect in a Goodyear "G159" tire caused a motor home accident. Pet. App. 8a; J.A. 36. Around the time of this case, Goodyear faced a number of lawsuits in different jurisdictions involving G159 tires. Goodyear accordingly retained Basil Munsuff of Roetzel & Andress, LPA as national coordinating counsel to manage the litigation and to coordinate discovery efforts across the various cases. Goodyear also hired Graeme Hancock of Fennemore Craig, P.C. as local counsel.

Mr. Munsuff worked directly with Goodyear engineers and technicians to locate documents. At the direction of counsel, Goodyear personnel combed through multiple electronic databases, engineering files, and documents in long-term storage in scores of banker's boxes and filing cabinets. ER426-27,

ER431-33.[1] Goodyear also reached out to former employees for assistance with these efforts. *Id.* Goodyear personnel eventually located all of the available testing data (including the Heat Rise test) and sent these documents directly to Mr. Munsuff. ER431-33, ER1013-14, ER1057-58.

In their initial set of document requests, Plaintiffs asked for a multitude of testing data, including "[a]ll test records for the G159 tires," which would have encompassed the Heat Rise test. ER639. Goodyear objected to the first set of requests for a variety of reasons, including overbreadth. Plaintiffs never filed a motion to compel in response.

Mr. Musnuff later advised Goodyear that the discovery requests had been narrowed, and consistent with that advice, Plaintiffs submitted a third request for production. It sought only "any speed or endurance testing" for "highway purposes" at 65 mph and 75 mph. ER680. After consulting with technicians at Goodyear regarding its internal purposes and uses for the various tests, Mr. Munsuff made the legal determination that the Heat Rise test was not responsive to this request: "I determined that it did not need to be produced." ER128-29.

The Heat Rise test was, however, produced in at least two other G159 cases that Goodyear was defending, *Schalmo* v. *Goodyear* in Florida and *Woods* v. *Goodyear* in Alabama. *Schalmo* went to trial, resulting in a $5.6 million verdict against

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[1] "ER" cites reference the Excerpts of Record filed at the Ninth Circuit in this case.

Goodyear. Pet. App. 114a-119a. The parties settled *Woods* just before trial. *Id.*; ER944.

After five years of intense litigation in the *Haeger* case, the parties settled on the eve of trial in April 2010.

B. The District Court Sanctions Goodyear and Counsel Under Its Inherent Authority.

Over a year after the settlement, Plaintiffs moved for sanctions for discovery fraud because Goodyear did not produce the Heat Rise test, relying on Fed. R. Civ. P. 16(f), 26(g), 37(b), and 37(c). ER720. Goodyear's response accordingly focused on the standards under those rules and did not address the prospect of inherent authority sanctions. ER573-88. Both parties requested oral argument.

Without waiting for oral argument, the district court issued proposed "findings of fact and conclusions of law," determining that Mr. Musnuff, Mr. Hancock, and Goodyear deliberately sought to "prevent the disclosure of the internal heat test results." Pet App. 51a-82a. Though the parties had not briefed the issue, the court relied on its inherent authority as its primary basis for sanctions. *Id.* at 69a-70a. The court also invoked 28 U.S.C. § 1927 against counsel (recognizing that the statute could not reach Goodyear), but declined to rely on any of Plaintiffs' arguments regarding sanctions under the discovery rules.

After deeming Goodyear and counsel guilty of withholding documents, the proposed order stated that the only issues left were determining who was responsible "for each instance of misconduct" and

"the appropriate amount to be awarded." *Id.* at 82a. But the court had already charted its course: "the Court must impose sanctions." *Id.* at 81a. It then directed the potentially sanctioned parties to respond to certain questions and attend an evidentiary hearing.

Both Mr. Musnuff and Mr. Hancock testified at the subsequent hearing. ER87-ER285. Mr. Musnuff explained that he made the decisions to object or produce documents, and he further confirmed that Goodyear's in-house counsel, Deborah Okey, never said "in words or in substances, don't produce the heat rise tests." ER175-76. Nonetheless, the district court later found that Ms. Okey retained final authority for approving discovery responses, and was copied on some of the emails between outside counsel regarding discovery. Pet. App. 88a, 93a-94a.

In the wake of the hearing, the district court ordered the production of additional documents, including privileged communications between counsel and Goodyear. Goodyear produced over 13,000 pages of documents, none of which revealed any directive by Goodyear to withhold the Heat Rise test or any other information.

After further briefing, the district court issued a final sanctions decision that largely reiterated its earlier conclusions. The court found that Goodyear, Mr. Hancock, and Mr. Musnuff all acted in bad faith in the course of "adopt[ing] a plan of making discovery as difficult as possible." Pet. App. 83a-172a, 150a. Although it did not find that Goodyear took any specific action to direct counsel to withhold documents, the court held that Goodyear was responsible for the conduct of its outside counsel.

The decision specifically faulted Ms. Okey for her description of a court order from another case in a declaration during the sanctions proceeding. *Id.* at 133a, 164a. The court also found that another Goodyear employee, Mr. Olsen, had inaccurately characterized his knowledge of the Heat Rise test in a deposition and a declaration. *Id.* at 134-35a.

As it imposed sanctions, the court noted that Plaintiffs "may wish to affirm their settlement agreement and pursue an independent cause of action for fraud." Pet. App. 153a. Duly prompted, Plaintiffs later commenced a separate state court lawsuit for fraud, abuse of process, and negligent misrepresentation against Mr. Musnuff, Mr. Hancock, Goodyear, and others in state court. *See Estate of Leroy Hager* v. *Goodyear Tire & Rubber Co.*, No. 2013-052753 (Maricopa Co. Sup. Ct.). Among other relief, Plaintiffs seek the same fees and costs that were awarded in this case. Mr. Musnuff, Mr. Hancock, and their associated law firms recently settled with Plaintiffs in both the state court matter as well as this case. Consequently, both have dismissed their cases before this Court pursuant to S. Ct. R. 46.

C. The District Court Declines to Limit Its Award to Compensatory Damages.

The district court awarded Plaintiffs "*all* of the attorneys' fees and costs" they incurred after Goodyear responded to Plaintiffs' initial discovery requests for "all test records." Pet. App. 152a (emphasis in original). The total fee award amounted to $2,741,201, nearly all of the fees and costs Plaintiffs incurred over the entire litigation. Pet. App. 44a, 185a. The court ordered that

Goodyear and Mr. Musnuff were jointly liable for 80% of the award ($2,192,960), with Mr. Hancock responsible for the remaining 20% ($548,240). *Id.* at 169a-170a, 185a.

In fashioning this award, the court found it would be "inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct" because "it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred." Pet. App. 151a-152a, 180a. The court reasoned that if Goodyear had produced "all responsive documents," it "might have decided to settle the case immediately," in which case "one could conclude practically all of Plaintiffs' fees and costs were due to misconduct." *Id.* at 152a.

The record evidence on this point, however, refuted the court's conclusion. In the *Schalmo* case in which Goodyear produced the Heat Rise test, the parties did not settle as soon as the document was turned over—much to the contrary, the case went all the way through trial. Likewise, in *Woods*, over nine months after the Heat Rise test was produced in that case, it settled on the courthouse steps.

Despite assuming the Heat Rise test might trigger an immediate settlement, the court found only that the tests were "relevant to Plaintiffs' claims." Pet. App. 129a. The district court did not determine the significance of the test, even though Goodyear's engineers explained that, as performed and used internally by Goodyear, the test had a limited scope and utility.

Appreciating the potential for reversal on appeal "in the event a direct linkage between the

misconduct and harm is required," the district court offered an "alternative" award that would have deducted $722,406.52 from the $2.7 million figure. Pet. App. 180a, 185a. Yet even this alternative deduction did not reflect a true causation analysis, focusing only on fees expended in litigating against Goodyear's co-defendants and proving medical damages. ER1352-53. Regardless, neither the district court nor the Ninth Circuit ever applied this deduction.

D. The Ninth Circuit's Decision.

Applying an abuse of discretion standard, the Ninth Circuit affirmed both the district court's imposition of sanctions as well as the amount. But the panel split on how the amount of sanctions should be determined. The majority held that *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 50 (1991), obviated any requirement "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct." Pet. App. 21a, 28a. Reasoning that because *Chambers* allowed all attorney's fees based on "fraud," a similar award was appropriate in this case once Goodyear and its outside counsel "began flouting their clear discovery obligations." *Id.* at 32a. The majority thus refused to apply any causation requirement to the sanctions imposed.

In dissent, Judge Watford explained that the rule requiring a "causal connection" between compensatory sanctions and misconduct "reflects the well-established principle, fully consistent with Supreme Court precedent, that a sanction can be deemed compensatory only if it compensates the

injured party for losses sustained as a result of the sanctionable misconduct." Pet. App. 46a-47a; *see also id.* at 49a (discussing *Int'l Union* v. *Bagwell*, 512 U.S. 821 (1994)). Judge Watford faulted the lack of any "causal link between Goodyear's misconduct and the fees awarded." Pet. App. 45a. He deemed it "unlikely" that Goodyear would have settled immediately, citing the *Schalmo* example and noting that the undisclosed test "did not provide conclusive proof that the Haegers' tire failed due to its defective design." *Id.* at 45-46a.

This Court subsequently granted *certiorari*.

SUMMARY OF ARGUMENT

The inherent authority of federal courts encompasses two types of monetary sanctioning powers—bad faith attorney's fee sanctions and contempt. These powers share a common lineage and a common purpose. They also place far-reaching powers in the hands of a single judge to make the rule, determine its violation, and assess its penalty.

In *Bagwell*, this Court drew a distinction between civil and criminal contempt that largely turned on the question of causation. Civil contempt is remedial, and it can be either coercive (affording the party the opportunity to comply) or compensatory. If there is no opportunity to avoid the fine, remedial monetary penalties must be "calibrated" "to compensate the complainant for losses sustained." Otherwise, the penalties trespass on the criminal realm and demand the due process protections of criminal contempt.

Bagwell simply built on this Court's prior precedent recognizing that civil contempt sanctions

are constrained by causation principles. Causation functions as an important check on a court's inherent power. Without this constraint, courts are free to impose more drastic monetary sanctions under inherent powers than those available for the ostensibly more serious sanction of contempt. Given the similarities between civil contempt and bad faith sanctions, their common dangers, and the overlapping caselaw, the same restriction should apply to these inherent authority sanctions.

The Ninth Circuit majority avoided this result by pointing to *Chambers*, suggesting that it created a different test for non-contempt inherent authority sanctions. But *Chambers* too recognized basic causation principles, emphasizing that "all" of the conduct involved in that case was sanctionable. It is accordingly best understood as a case applying a causation standard on unusual facts.

Chambers certainly did not repudiate basic causation restrictions, and for good reason. All of the other main sanctioning regimes (Rule 11, 28 U.S.C. § 1927, and the discovery rules) require direct causation. Civil contempt demands the same for remedial sanctions. It would be anomalous for inherent authority sanctions to sweep more broadly in terms of available remedies than all of these other powers.

That would also be dangerous. Without any legislative check, inherent authority sanctions would be subject to no limiting principle other than "bad faith." But "bad faith," reviewed under an abuse of discretion standard, does not alone provide a sufficient check on inherent authority sanctions, and it offers no check on the amount of sanctions. It is difficult to conceive how any attorney's fee award, no

matter how high or shocking, could ever be overturned without a direct causation requirement. There would simply be no limiting principle on the amount a court could award.

Consistent with the "restraint and discretion" espoused by this Court, and with its prior cases discussing and applying causation, this Court should limit inherent authority sanctions to those attorney's fees directly caused by the claimed misconduct. The Ninth Circuit's judgment affirming the amount of sanctions should accordingly be vacated.

ARGUMENT

I. A Federal Court Must Apply Causation When Imposing Monetary Inherent Authority Sanctions

The federal courts have long recognized that they possess certain "inherent" powers necessary to ensure the efficient functioning of the judiciary. Most of these recognized powers concern basic case administration functions—powers that generally may be exercised unless overridden by Congress or the Federal Rules. But this Court has been cautious in any expansion of the sanctioning power (both contempt and inherent authority sanctions) because of the separation of powers and due process issues implicated, and because of the costs borne (monetary and reputational) by the sanctioned party. Although the Court has imposed various limits, it should now formally recognize—consistent with its prior cases in this area—that attorney's fee sanctions under inherent power are limited by a direct causation requirement.

A. Inherent Powers Must Be Limited By Principles of Separation of Powers, Due Process, the American Rule, and Judicial Restraint

The Ninth Circuit's rule would create a sanctioning power freed from the basic protections available under extant rules and statutes, and beyond the bounds of the typical restraints on inherent authority. Because a court's inherent powers are "governed not by rule or statute," this Court has recognized the need to impose limits on those powers. *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016) (quoting *Link* v. *Wabash R.R. Co.*, 370 U. S. 626, 630-31 (1962)). In *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980), the Court declared that, "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *See also Dietz*, 136 S. Ct. at 1893 ("Because the exercise of an inherent power in the interest of promoting efficiency may risk undermining other vital interests related to the fair administration of justice, a district court's inherent powers must be exercised with restraint."). *Missouri* v. *Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("As with any inherent judicial power, however, we ought to be reluctant to approve its aggressive or extravagant use, and instead we should exercise it in a manner consistent with our history and traditions."). Specific limits are required to hold courts accountable "both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50. The reason for this reluctance springs from the very nature of a court's inherent authority—free from

legislative constraints, the court alone fashions and applies that power.

1. Unbridled or amorphous inherent powers threaten core constitutional principles in view of the concentration of power in a single judge's hands: "That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." *Int'l Union* v. *Bagwell*, 512 U.S. 821, 840 (1994) (Scalia, J., concurring); *Degen* v. *United States*, 517 U.S. 820, 823 (1996) ("The extent of these powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."). Such concerns are magnified because the abuse of discretion standard of review generally insulates the trial judge's decision on appeal.

These constitutional problems become more pronounced when judges feel that their authority has been questioned: "Contumacy 'often strikes at the most vulnerable and human qualities of a judge's temperament,' and its fusion of legislative, executive, and judicial powers 'summons forth the prospect of 'the most tyrannical licentiousness[.]'" *Bagwell*, 512 U.S. at 831 (citations omitted). This Court's observation that contempt is "uniquely ... liable to abuse," *id.*, applies with equal, if not greater, force to fee-shifting sanctions. After all, Congress has at least put some legislative parameters around the contempt power. *See, e.g.*, 18 U.S.C. § 401; *see also* Fed. R. Crim. P. 42.

2. Consistent with these constitutional limitations, and to prevent overreach, the Court has

often intervened to require that the exercise of inherent powers be necessary and proportionate to the wrong committed. Under the necessity principle, "[a] court's inherent power is limited by the necessity giving rise to its exercise." *Degen*, 517 U.S. at 829. This principle recognizes that "[t]he inherent powers of federal courts are those which 'are necessary to the exercise of all others.'" *Roadway Express*, 447 U.S. at 764 (quoting *United States* v. *Hudson*, 7 Cranch 32, 34 (1812)). Where "alternative means" of accomplishing a court's objectives exist, no "necessity" justifies a harsher sanction. *Degen*, 517 U.S. at 827, 828 ("Both interests are substantial, but disentitlement is too blunt an instrument for advancing them."); *Gen. Bldg. Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 398-99 (1982) (discussing "fundamental limitations on the remedial powers of the federal courts" which "could extend no farther than required by the nature and the extent of th[e] violation") (internal quotations omitted).

The proportionality requirement furthers the same ends. The Court recognizes that "[p]rinciples of deference counsel restraint in resorting to inherent power, and require its use to be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823-24 (citation omitted); *Dietz*, 136 S. Ct. at 1892 ("[A]n inherent power must be a reasonable response to a specific problem."); *Bagwell*, 512 U.S. at 832 ("Our jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness . . . ."). This Court has also rejected other specific forms of sanctions "where 'means more narrowly tailored to deter objectionable . . . conduct are available.'" *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) (quoting *United*

States v. *Hasting*, 461 U.S. 499, 506 (1983)); *Degen*, 517 U.S. at 829 ("There was no necessity to justify the rule of disentitlement in this case. . . ."). These basic principles resonate throughout this Court's sanctions jurisprudence, and they laid the foundation for *Bagwell*, discussed more fully in Section B, below.

3. A court's inherent power to assess attorney's fees—the sanction at issue here—is further limited by the American Rule. "[D]eeply rooted in our history and in congressional policy," the Rule provides that the prevailing party ordinarily cannot recover its own attorney's fees against the adverse party. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 271, 260 (1975). Of course, Congress can, and sometimes does, override that rule in specific legislation through a "prevailing parties" provision. But, generally, the responsibility for altering the American Rule rests with Congress, and "it is not for [the courts] to invade the legislature's province by redistributing litigation costs." *Id.* at 271; *see also Baker Botts LLP* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) ("We consequently will not deviate from the American Rule absent explicit statutory authority.") (internal quotations omitted).

Duly cognizant of the American Rule, this Court has recognized a potential exception for fee shifting under inherent powers, but only "in narrowly defined circumstances." *See Roadway Express*, 447 U.S. at 765. Under the bad-faith exception applied here, a court may assess attorney's fees "against a party who has litigated in bad faith," or "against counsel who willfully abuse judicial processes." *Id.* at 766; *see also Alyeska*, 421 U.S. at 258-59 (recognizing that a court may assess attorney's fees when a party has

"acted in bad faith, vexatiously, wantonly, or for oppressive reasons") (internal quotations omitted). At the same time, Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. Therefore, this exception must be narrowly limited lest it swallow the rule.

4. Finally, it is well-settled that "[w]hatever the scope of this 'inherent power,' . . . it does not include the power to develop rules that circumvent or conflict with" the Federal Rules of Civil and Criminal Procedure. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996). "[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia*, 487 U.S. at 255. Judicial restraint and respect for congressional prerogatives generally militate against imposition of inherent authority sanctions, because Congress has already defined the types of sanctionable conduct and the procedures for holding someone accountable.

Illustrating these points, the Sixth Circuit recently reversed an inherent authority sanction against counsel in a criminal case. *See United States* v. *Aleo*, 681 F.3d 290 (6th Cir. 2012). Concurring, Judge Sutton explained that the rules "spell[] out the procedural prerequisites for imposing a sanction," such as "who may seek sanctions," "the types of sanctions available," and "the purpose and limits of a sanction." *Id.* at 307 (Sutton, J., concurring). While inherent authority may "fill a gap in the Civil Rules," courts should not "invoke that power to ease the burden of satisfying existing Civil Rules—to punish practices exempted by a Rule or that fall short of

meeting a Rule's standard for sanctionable conduct." *Id.*

B. *Bagwell* Recognizes a Causation Requirement

Building on the above background principles, the Court in *Bagwell* imposed a causation requirement on monetary sanctions for civil contempt. To "protect the due process rights of parties" and prevent "the arbitrary exercise of official power," 512 U.S. at 834, the Court rejected the "relatively unlimited judicial power to impose noncompensatory civil contempt fines" that had been embraced by some lower courts, *id.* at 830. Reversing fines that were not "calibrate[d]" to losses caused by the misconduct, the Court held that noncompensatory fines constitute criminal sanctions that require the protection of basic criminal due process. *Id.* at 834, 837, 838. The Ninth Circuit erred in rejecting the limitations recognized by *Bagwell*.

1. This Court has chronicled "the unwisdom of vesting the judiciary with *completely untrammeled power* to punish contempt, and . . . the need for *effective safeguards* against that power's abuse." *Bloom* v. *Illinois*, 391 U.S. 194, 207 (1968) (emphasis added). Judicial overreach in early contempt cases led to congressional curtailment of the power as well as a recognition that courts had to be vigilant in policing its scope: "[t]hat contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir." *Id.* at 202 n.4 (quoting *Sacher* v. *United States*, 343 U.S. 1, 12 (1952)). Writing against this backdrop, the Court in *Bagwell* strictly limited a

court's inherent power to punish through noncompensatory means, largely hinging the distinction between civil and criminal contempt on causation.

Bagwell underscored that "the stated purposes of a contempt sanction alone cannot be determinative." Rather than rely on the label announced by the district court, the reviewing court must look to "the 'character and purpose' of the sanction involved." 512 U.S. at 827-28; *Penfield Co. of Cal.* v. *SEC*, 330 U.S. 585, 590 (1947) ("It is the nature of the relief asked that is determinative of the nature of the proceeding.").

Bagwell itself involved fines levied against a labor union for violations of an injunction. 512 U.S. at 823-24. In a series of contempt hearings following strike-related activities, the trial court found over 400 instances of contempt and levied $52 million in noncompensatory fines payable to the Commonwealth of Virginia and two counties impacted by the unlawful activity. *Id* at 824.

To determine the process due for these noncompensatory fines, *Bagwell* expounded upon the distinction between civil and criminal contempt. A contempt sanction is civil "if it is remedial, and for the benefit of the complainant." *Bagwell*, 512 U.S. at 827 (internal quotations and citations omitted). To be "remedial," a fine must either be "compensatory" or "coercive," meaning it offers the sanctioned party "an opportunity to purge." *Id.* at 829.

On the other hand, a sanction is "criminal" if "the sentence is punitive, to vindicate the authority of the court." *Id.* at 828. These punishments include "fixed, determinate, retrospective criminal fines

which petitioners had no opportunity to purge once imposed." *Id.* at 837. "Thus, a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." *Id.* at 829 (quoting *Penfield Co.*, 330 U.S. at 588). A court's criminal sanction "operates not to coerce a future act from the defendant for the benefit of the complainant, but to uphold the dignity of the law, by punishing the contemnor's disobedience." *Id.* at 845 (Ginsburg, J., concurring in part and in judgment).

Applying this dichotomy, *Bagwell* held that serious noncompensatory fines are "punitive," not "remedial," and therefore warrant basic criminal due process protections. *Id.* at 829, 835-39. Highlighting the fine's punitive character, the Court emphasized that the trial court did not "***calibrate the fines to damages caused by the . . . contumacious activities***," or "***indicate that the fines were 'to compensate the complainant for losses sustained.'***" *See id.*, 512 U.S. at 834 (emphasis added) (quoting *United States* v. *United Mine Workers*, 330 U.S. 258, 303-304 (1947)). In other words, the key line of demarcation between civil and criminal contempt is causation.[2] *See also Bagwell*, 512 U.S. at 847 (Ginsburg, J., concurring in part and in judgment) (explaining that fines were criminal, among other reasons, because the state did not "t[ie] the exactions exclusively to a claim for compensation").

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[2] *Bagwell* also noted that the fines were to be paid not to a party but to government entities that never asked for compensation, and that the union had no opportunity to purge. 512 U.S. at 834, 837.

In this regard, the Court built upon the foundation of *United Mine Workers*: "[w]here compensation is intended, . . . [s]uch fine must of course be based upon evidence of complainant's *actual loss*. . . ." *United Mine Workers*, 330 U.S. at 304 (emphasis added). But the causation requirement has deeper roots. *See, e.g., Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) (sanction "operates . . . solely as punishment" where it "cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury *caused by* the disobedience") (emphasis added). *Bagwell* thus clarified the importance of causation in differentiating between civil and criminal contempt.

2. Although *Bagwell* addressed a contempt scenario, the Court has long recognized the intertwined nature of contempt and inherent authority sanctions, including their common purpose: "[T]he award of attorney's fees for bad faith *serve[s] the same purpose* as a remedial fine imposed for civil contempt,'" which before *Bagwell*, included "vindicate[ing] the District Court's authority over a recalcitrant litigant.'" *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) (emphasis added). But *Bagwell* explained that vindication of the court's authority is a goal of *criminal* contempt. *See* 512 U.S. at 827-28. In the aftermath of *Bagwell*, an award of attorney's fees for bad faith that serves the same "punitive" purpose as criminal contempt should be treated in the same manner.

Not only do these sanctions serve similar functions, but they flow from the same source. The contempt power, after all, is itself an inherent power—indeed, it lies at the heart of the inherent power to punish. *Michaelson* v. *United States*, 266 U.S. 42, 65 (1924)

("That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law."). Exemplifying this overlap, the principle that inherent powers "must be exercised with restraint and discretion" when shifting fees for bad-faith conduct derives from cases limiting the contempt power. *See Roadway Express*, 447 U.S. at 764-65 (citing *Gompers*, 221 U.S. at 450-51 (contempt case)). Accordingly, the contempt power and the inherent power to shift fees for bad-faith conduct are cut from the same doctrinal cloth.

3. In fact, there is all the more reason to exercise vigilance over a court's invocation of its inherent power when it is not denominated as "contempt." The historical concerns over abuse of power that animate *Bagwell*'s causation requirement resonate with even greater force where the court operates without even the constraints of the contempt statute and procedural rules. "In punishing contempt, the Judiciary is sanctioning conduct that violates *specific duties* imposed by the court itself, arising directly from the parties' participation in judicial proceedings." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 800 (1987) (emphasis added). Operating in the interstices, inherent authority should not be used as an excuse for evading otherwise applicable limits on the sanctioning power. *See Aleo*, 681 F.3d at 311 (Sutton, J., concurring) ("A court's inherent power to sanction is not a second-division contempt power to be used when an attorney's conduct is almost, but not quite, punishable under § 401 and Rule 42.").

Consistent with this analysis, when faced with the question, most courts of appeals have applied *Bagwell*'s reasoning to inherent powers sanctions

and/or sanctions imposed under the Rules. *See, e.g.*, *Mackler Prods., Inc.* v. *Cohen*, 146 F.3d 126, 130 (2d Cir. 1998) (explaining that "sanctions and contempts raise certain similar concerns," and concluding "that the imposition of a sufficiently substantial punitive sanction requires . . . the procedural protections appropriate to a criminal case"); *Bradley* v. *Am. Household, Inc.*, 378 F.3d 373, 379 (4th Cir. 2004) (holding that fines imposed pursuant to "inherent authority" and Rule 37 were "for criminal contempt" and required "the procedural protections necessary for a judgment of criminal contempt"); *Crowe* v. *Smith*, 151 F.3d 217, 221, 226-29 (5th Cir. 1998) (applying *Bagwell* to vacate monetary sanctions imposed under district court's "inherent power"); *Baycol Steering Comm.* v. *Bayer Corp.*, 419 F.3d 794, 808-09 (8th Cir. 2005) (remanding inherent authority sanction because it was "payable to the clerk of the court and not concretely tailored to compensate . . . for actual costs resulting from the misconduct"); *F.J. Hanshaw Enters.* v. *Emerald River Dev., Inc.*, 244 F.3d 1128, 1139 (9th Cir. 2001) ("We agree with the reasoning of . . . *Mackler Productions*, which held substantial punitive sanctions to be enough like criminal contempt to warrant the same due process protections."); *but see United States* v. *Romero-Lopez*, 661 F.3d 106, 107-08 (1st Cir. 2011) (declining to apply *Bagwell*'s reasoning to $1500 fine for attorney's failure to attend hearing imposed as non-contempt inherent powers sanction); *De Manez* v. *Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 590-92 (7th Cir. 2008) (explaining that "inherent power. . . . is distinct from the contempt power," and declining to apply *Bagwell*).

The prevailing view makes sense, particularly in light of the shared lineage between contempt and

inherent authority sanctions. Given that contempt covers direct defiance of a court order, one would not expect inherent authority sanctions to entail much more sweeping relief for subtler forms of misconduct. Perversely, had Goodyear refused a court order to produce the Heat Rise test and been found in contempt, it would not have faced as high of a monetary sanction than when the court resorted to its inherent authority under the Ninth Circuit's rule.

C. *Chambers* Does Not Repudiate Causation

In rejecting a causation test, the Ninth Circuit majority turned to *Chambers*, interpreting it as establishing that a compensatory sanctions award need not link the amount to the misconduct so long as there were "frequen[t] and sever[e] . . . abuses of the judicial system." 501 U.S. at 56. But this elevates the inherent authority sanctioning power to be more potent than contempt—which stands fundamentally at odds with *Chambers* itself. *Chambers* simply is not a vehicle for evading the foundational causation requirement recognized by *Bagwell* and rooted in this Court's jurisprudence.

1. Contrary to the Ninth Circuit majority's reading, *Chambers* does not create a separate category of inherent powers sanctions for misconduct involving widespread abuses that are free from any causation constraints. Instead, the Court found a causal connection between the sanctions award and the extraordinary misconduct at issue in that case. In fact, it recognized that part of the purpose for inherent authority sanctions was "making the prevailing party whole for expenses *caused by* his opponent's obstinacy." *Chambers*, 501 U.S. at 46

(emphasis added) (quoting *Hutto*, 437 U.S. at 689, n.14).

Mr. Chambers, the owner of a television station, agreed to sell the station's facilities and broadcast license to respondent NASCO, Inc., but subsequently had second thoughts. *Id.* at 35-36. When NASCO decided to seek specific performance and a temporary restraining order in federal court, Mr. Chambers and his attorney orchestrated a relentless campaign of fraud and frivolous litigation. *Id.* at 36-38. The district court ultimately exercised its inherent power to impose nearly $1 million in sanctions, representing "the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40.

Under these exceptional circumstances, the Court found that the fee award causally linked to the misconduct. As Judge Watford explained, "[b]ecause the district court found that Chambers never had a good-faith basis for resisting the relief NASCO sought . . . , it seems fair to say that all of NASCO's attorney's fees were incurred as a direct result of Chambers' misconduct." Pet. App. 48a. Or, as this Court summarized it, "*all* of [the] litigant's conduct [was] deemed sanctionable." *Chambers*, 501 U.S. at 51 (emphasis added).

Nowhere in *Chambers* does the Court "expressly reject[] the linkage argument," as the Ninth Circuit posited. Pet. App. 32a. Absent Mr. Chambers' "'sordid scheme of deliberate misuse of the judicial process,'" there would have been no litigation at all. *Chambers*, 501 U.S. at 57 (quoting *Nasco, Inc.* v. *Calcasieu TV & Radio*, 124 F.R.D. 120, 128 (W.D. La. 1989)). Therefore, *Chambers* is fully consistent with a causation requirement, albeit an unusual application of one.

This reading of *Chambers* is buttressed by the Court's frequent reliance on *Hutto* v. *Finney*, 437 U.S. 678 (1978) in its opinion. *Hutto* expressly equated an attorney fee award for bad faith misconduct with civil contempt, as noted above: "the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt." *Id.* at 691. In this respect, *Hutto* highlighted the causation factor that applies to both: "That the award had a compensatory effect does not in any event distinguish it from a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience." *Id.* at 691 n.17. *Hutto* concluded that an attorney's fee award imposed pursuant to a court's inherent authority "makes the prevailing party whole for expenses *caused by* his opponent's obstinacy." *Id.* at 689 n.14 (emphasis added). But *Hutto* declined to go even that far—its fee award did not "adequately compensate counsel for the work that they have done. . . ." *Id.* at 691 (quoting *Finney* v. *Hutto*, 410 F. Supp. 251, 285 (E.D. Ark. 1976)).

2. To the extent that *Chambers* stands in tension with *Bagwell*, however, *Bagwell* should control. As Judge Watford noted, *Chambers* made clear that the "dual purpose" sanctions award was "partly punitive." Pet. App. 48a-49a. Subsequent to *Chambers*, this Court in *Bagwell* sharply delineated between compensatory and punitive contempt sanctions and required certain criminal due process protections to be afforded for the latter. *See id.* at 49a (Watford, J., dissenting) ("Moreover, the law has changed since *Chambers* was decided."). As described above, *Bagwell* clarified that monetary sanctions imposed without satisfying a causation

requirement are punitive and must be addressed as criminal contempt.

The *Chambers* Court did not have occasion to consider the due process question raised in *Bagwell*. Without evaluating those concerns, *Chambers* rightfully appreciated that the contempt jurisprudence should guide the exercise of inherent powers. It highlighted the intertwined nature of contempt and inherent authority sanctions. 501 U.S. at 53 (quoting *Hutto*, 437 U.S. at 691). And it summoned authority in the contempt context to support an award for all fees. *Id.* at 45 ("[A] court's discretion to determine 'the degree of punishment for contempt' permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation.") (quoting *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 428 (1923)). But *Bagwell* has since clarified the landscape on which *Chambers* relied, holding that a "punitive" monetary sanction "to vindicate the authority of the court" constitutes criminal contempt, 512 U.S. at 828, and squarely addressing a question that simply was not before the Court in *Chambers*.

Chambers did acknowledge, however, that inherent authority sanctions were viewed as a less potent sanction than contempt, describing "the more drastic sanctions available for contempt of court." *Id.* at 46 (quoting *Hutto*, 437 U.S. at 689 n.14). One would not expect to see far more sweeping remedies under inherent authority sanctions than those available under the "more drastic" contempt regime. But as the Ninth Circuit majority shows, without clear standards, courts are enabling inherent authority sanctions to become a transcendent power overshadowing (and more potent than) contempt.

4. To the extent that *Chambers* is read as endorsing a largely unchecked version of inherent authority sanctions, that view is also refuted by another case decided shortly after *Bagwell*, *Degen* v. *United States*. In *Degen*, the Government advocated that a district court's inherent power authorized it to strike certain claims under the fugitive disentitlement doctrine. 517 U.S. at 822-23. After some lower courts embraced that theory, this Court unanimously reversed. Fundamentally, the Court highlighted the disproportionate nature of the sanction to the perceived violation, emphasizing "the lack of necessity for the harsh sanction of absolute disentitlement." *Id.* at 827. Consistent with the *Bagwell* analysis, the Court held that the "need to redress the indignity visited upon the District Court" does not justify using "too blunt an instrument" for advancing that purpose. *Id.* at 828. *Degen* confirmed that a court's exercise of its inherent powers cannot be "an arbitrary response to the conduct it is supposed to redress or discourage." *Id.*

Writing shortly (and largely unanimously) after the divided decision in *Chambers*, this Court in two different contexts (*Bagwell* and *Degen*) placed important limits on inherent power. These limits of causation and necessity confirm that *Chambers* did not spell the demise of causation for inherent authority sanctions. Therefore, the Ninth Circuit erred in relying on *Chambers* to eliminate causation for inherent authority sanctions.

D. Other Sanctions Mechanisms Require A Direct Causation Standard

Recognizing a causation limitation on inherent authority sanctions also comports with other sanctioning regimes. The three most common—Rule

11, 28 U.S.C. § 1927, and the discovery rules—all limit sanctions to those attorney's fees directly caused by the misconduct. This Court's analysis in *Fox* v. *Vice*, 563 U.S. 826 (2011), lends further support on this point.

1. Offering an instructive model, Rule 11 of the Federal Rules of Civil Procedure limits fee shifting for baseless claims and defenses to those expenses "directly resulting from the violation." Fed. R. Civ. P. 11(c)(4). In *Chambers*, this Court expressly recognized the parallels between the bad faith inherent authority sanctions and certain aspects of Rule 11. *See* 501 U.S. at 46 n.10.

If a court desires to shift attorney's fees to the movant under Rule 11, the remedy is limited to "part or all of the reasonable attorney's fees and other expenses *directly resulting* from the violation." Fed. R. Civ. P. 11(c)(4) (emphasis added). This means, for example, that a plaintiff confronted with a frivolous counterclaim does not receive all fees related to its defense, but just "those *directly caused* by inclusion of the improper count, and not those resulting from the filing of the . . . answer itself." Fed. R. Civ. P. 11(b) and (c) advisory committee's note to 1993 Amendments (emphasis added). The direct causation requirement also requires the other side to effectively mitigate its damages by bringing an early challenge to a groundless claim or defense. *See id.*

This Court adopted a direct causation requirement in this context when interpreting an earlier, less stringent version of Rule 11 that limited fees to those incurred "because of" the violation. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 406-08 (1990). Rejecting an "overbroad" reading of causation, the Court held that "Rule 11 is more sensibly understood

as permitting an award only of those expenses *directly caused* by the filing." *Id.* at 406 (emphasis added). The Court declined to endorse a broader view that "would lead to the conclusion that expenses incurred 'because of' a baseless filing extend indefinitely," *id.*, instead adopting a direct causation requirement later codified in the Rule.

2. Statutory remedies for bad faith conduct also limit an award of attorney's fees by a causation requirement. 28 U.S.C. § 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously" may be ordered to pay "the excess costs, expenses, and attorneys' fees reasonably incurred *because of* such conduct." (emphasis added). Courts recognize that sanctions under Section 1927 and inherent powers are similar. *See Oliveri* v. *Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (noting that "the only meaningful difference" between inherent power and Section 1927 is that "an award under the court's inherent power may be made against . . . a party").

"[A]imed at specific conduct and claims," Section 1927 "authorizes awards only for actual fees and costs which proscribed conduct has caused." *Browning* v. *Kramer*, 931 F.2d 340, 346 (5th Cir. 1991). These awards must "identify the specific conduct . . . which unreasonably and vexatiously multiplied the proceedings" and "then determine the excess fees and costs incurred by the opponents in meeting such claims." *Id.* This analysis aligns with *Cooter & Gell*'s interpretation of the phrase "because of"—courts should "award only . . . those expenses directly caused" by the misconduct under that statute. *Cooter & Gell*, 496 U.S. at 406; *see, e.g.*, *Manion* v. *Am. Airlines, Inc.*, 395 F.3d 428, 433 (D.C.

Cir. 2004) (panel included Roberts, J.) (noting that "much of [*Cooter & Gell*'s] rationale applies with equal force in the § 1927 context").

3. Discovery sanctions, too, are expressly limited by a causation requirement. *See, e.g.*, *Batson v. Neal Spelce Assoc., Inc.*, 765 F.2d 511, 516 (5th Cir. 1985) (reversing fee award for lack of causation because "[t]he plain language of Rule 37 . . . provides that only those expenses, including fees, caused by the failure to comply may be assessed against the noncomplying party"). Rule 37 authorizes the award of reasonable expenses for a variety of discovery violations. Fed. R. Civ. P. 37(a)(5)(A)-(C), (b), (c), (d), (f). The court may award only those reasonable attorney's fees "caused by" the misconduct, Fed. R. Civ. P. 37(b)(2)(C), (c)(1)(A), (d)(3), (f), or "incurred in" remedying the misconduct, Fed. R. Civ. P. 37(a)(5), (c)(2); *see also* Fed. R. Civ. P. 26(g)(3) ("The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.").

Recent rules amendments, furthermore, discourage resort to inherent powers to remedy discovery violations. The Advisory Committee Notes to the new amendments expressly state that the new Rule 37(e) governing spoliation sanctions for electronically-stored information "forecloses reliance on inherent authority or state law to determine when certain measures should be used." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 Amendment. The Committee observed that the "[f]ederal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information." *Id.* Likewise, without a clear

causation standard cabining a district court's discretion, lower courts will continue to vary widely in their application of inherent powers sanctions.

4. Consistent with these sanctioning regimes, the Court recently addressed remedies for frivolous claims in the civil rights context, imposing a "but-for" causation requirement on fee awards to defendants under 42 U.S.C. § 1988. In *Fox* v. *Vice*, the Court held that, in a suit involving both frivolous and non-frivolous claims, a defendant could recover "only for costs that the defendant would not have incurred but for the frivolous claims." 563 U.S. at 829. In endorsing a but-for causation test, the Court rejected a "fairly attributable" test proposed by plaintiffs as largely meaningless. *See id.* at 836 ("[C]ongressional policy points to a different and more meaningful standard."). The Court reasoned that, "if the defendant would have incurred those fees anyway, to defend against *non*-frivolous claims, then a court has no basis for transferring the expense to the plaintiff." *Id.* Accordingly, it endorsed but-for causation in part because "[a] standard allowing more expansive fee-shifting would furnish windfalls to some defendants, making them better off because they were subject to a suit including frivolous claims." *Id.* at 837.

Although it arose in a different context, the *Fox* analysis largely echoes the "directly resulting from" requirement under current Rule 11 and this Court's decision in *Cooter & Gell*.

5. As all of these examples illustrate, Congress and the Rules Committee have seen fit to impose a causation requirement on attorney's fees awarded for bad faith, vexatious, and frivolous litigation. The policy judgment here is sound—sanctions should be narrowly tailored to the harm directly caused by the

misconduct, rather than afford some type of wide-ranging damages remedy. To prevent courts from evading this legislative judgment, the Court should likewise recognize a causation limit on a court's inherent power to impose monetary sanctions. Otherwise, the temptation will exist for courts to look to inherent authority first, rather than secondarily, and circumvent the restrictions associated with statutory and rule-based sanctions.

II. This Case Illustrates the Need for a Direct Causation Requirement

Direct causation is needed as an important check on the inherent authority sanctioning power. Without any legislative oversight, the only other conceivable checks are this Court's admonition that "restraint and discretion" should be exercised—which does not tangibly restrict the imposition of sanctions—and the "bad faith" requirement—which is vague and applied inconsistently. Direct causation, however, limits district court discretion and ensures that inherent power sanctions will be applied consistently and not in such a way that eclipses the statute and rule-based sanctioning regimes.

A. The Courts Below Did Not Apply the Correct Standard

1. Both the district court and the Ninth Circuit majority refused to apply a causation limitation on the inherent authority sanctions imposed in this matter. Before Plaintiffs submitted a single billing record, the district court concluded that any causation linkage would be "impossible," and thus it declined to "separate the fees incurred due to legitimate activity from the fees and costs incurred

due to Goodyear's refusal to abide by clear and simple discovery obligations." Pet. App. at 151a-52a. Abdicating any responsibility to tailor sanctions, the court awarded nearly all fees and then arbitrarily allocated responsibility 80% jointly to Mr. Musnuff and Goodyear, and 20% to Mr. Hancock. *Id.* at 169a-170a, 185a.

Shielded by the court's order, Plaintiffs made no attempt to establish a causal link in their subsequent fee application. J.A. 54; J.A. 80. Goodyear pointed out (among other things) that Plaintiffs incurred a substantial portion of their fees litigating against other defendants and substantiating their medical injuries and damages, none of which bore any relation to any alleged misconduct. J.A. 58. The district court's only response was to suggest an alternative amount "in the event a direct linkage between the misconduct and harm is required" on appeal, which would deduct over $700,000 from the total sanction. Pet. App. 180a. But even this causation "deduction" (which neither the district court nor the Ninth Circuit actually adopted) did not apply a true causation analysis—it only represented the fees incurred by Plaintiffs in litigating against other defendants and substantiating their amount of medical damages.

On appeal, the Ninth Circuit majority validated the district court's refusal to apply causation, rejecting the rule "that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct." Pet. App. 28a.

2. Although a district court typically enjoys discretion in sanctions matters, such deference is only warranted when it applies the correct standard:

"A trial court has wide discretion when, but only when, it calls the game by the right rules." *Fox*, 563 U.S. at 839. As discussed above, the failure to require a direct causal link violates this Court's precedent on inherent powers, infringes on the due process rights of sanctioned parties, and is inconsistent with other sanctioning regimes. The Court should enforce a direct causation requirement that limits attorney's fees sanctions awards to the strictly compensatory and remand for the trial court to apply that correct standard.

Under the direct causation standard, attorney's fee awards imposed under a court's inherent power must compensate the injured party only for fees "incurred as a direct result of" the sanctionee's misconduct. *Baycol Steering Comm.*, 419 F.3d at 808. Where the monetary sanction does not "relate[] *concretely* to costs . . . *directly incurred* because of" the sanctionee's misconduct, it is not compensatory. *Id.* (emphasis added). Such sanctions must be appropriately "*tailored* to compensate the complaining party" for "any losses incurred by [them] as a result of [the defendant's]'" bad faith actions. *Bradley*, 378 F.3d at 378 (emphasis added, citing *Buffington* v. *Balt. Cty.*, 913 F.2d 113, 134 (4th Cir. 1990)). Direct causation parallels the "direct effect" test under Rule 11 and the "but for" test recognized in *Fox*, and thus should be familiar to federal courts.

But it bears emphasizing that the direct causation standard establishes only the upper limit on sanctions, which can (and generally should) be reduced from there. Courts are obligated to exercise "'the least possible power adequate to the end proposed.'" *Spallone* v. *United States*, 493 U.S. 265, 280 (1990), citing *Anderson* v. *Dunn*, 19 U.S. (6

Wheat) 204, 231 (1821); *see also Charbono* v. *Sumski (In re Charbono)*, 790 F.3d 80, 88 (1st Cir. 2015) (affirming $100 inherent power sanction because lower court opted for "the least extreme sanction reasonably calculated to achieve the appropriate punitive and deterrent purposes") (citation omitted); *Natural Gas Pipeline Co. of Am.* v. *Energy Gathering*, 86 F.3d 464, 467 (5th Cir. 1996) ("the [inherent authority] sanction chosen must employ 'the least possible power adequate to the end proposed'") (citation omitted). The causation standard helps ensure that courts comply with this tailoring obligation—this requirement would not be met if a court awarded the impacted party *more* fees than it incurred in response to the misconduct.

Turning its back on these principles, the district court essentially threw up its hands at the specter of calculating sanctions caused by the misconduct. Its award of "all" fees does not comply with a causation requirement, as this Court and others have recognized. *See, e.g.*, *Roadway Express*, 447 U.S. at 756 n.3 ("[Section] 1927 provides only for excess costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation.'") (internal quotations omitted); *Maynard* v. *Nygren*, 332 F.3d 462, 471 (7th Cir. 2003) (under Rule 37: "As long as the suit as a whole was not frivolous . . . the remaining attorney's fees would have been incurred even without the discovery violation; thus, the causality requirement was not met."); *Topalian* v. *Ehrman*, 3 F.3d 931, 937 (5th Cir. 1993) (under Section 1927, Rule 11, and the discovery rules: "Certainly, an award of *all* costs incurred in defending this cause of action would not

be appropriate if the violations consisted primarily of abuses of the discovery procedures[.]").

As with other sanctions, a direct causation requirement could be applied here: the district court found specific instances of misconduct, those instances of misconduct gave rise to certain fees, and as Judge Watford explained, "[t]hose fees can be calculated." Pet. App. 50a. Courts routinely are required to undertake the analysis that the lower courts avoided in this case. Even if it proves difficult, a causation analysis is necessary to demonstrate that monetary sanctions are not vindictive, overly harsh, or rising to the level of criminal penalties.

To avoid straying beyond compensatory civil sanctions, the district court should have "limited the award to fees that can be linked in a non-speculative way to the misconduct" such as "those wasted on expert discovery that took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist." *Id.* at 50a (Watford, J., dissenting). Other categories of recoverable fees in this case might include those incurred seeking supplemental discovery and attending hearings where potential misconduct occurred or where these discovery matters were discussed. But ultimately this would be Plaintiff's burden to prove—a burden they did not attempt to meet below. *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 391 & n.21 (3d Cir. 1997) (partially overruled on other grounds) (affirming denial of monetary award under inherent powers: "[T]he applicant for fees has an affirmative responsibility to assist the court in sorting through, organizing, and evaluating a fee request."); *Cf. FTC* v. *Kuykendall*,

371 F.3d 745, 754 (10th Cir. 2004) (en banc) ("[I]n compensatory civil contempt proceedings. . . district court judges should require proof of contempt by clear and convincing evidence and proof of the amount of compensatory damages by a preponderance of the evidence.").

The court's mere speculation cannot satisfy direct causation, or else it renders the standard meaningless. *See Allied Materials Corp.* v. *Superior Products Co.*, 620 F.2d 224, 227 (10th Cir. 1980) ("In the absence of evidence showing the amount of the loss, any sum awarded by the court is speculative and therefore arbitrary."). The award here was driven by the possibility that Goodyear might have settled "immediately" upon producing the tests, prompting a sanction of all fees from that point forward. Pet. App. 152a. Awash in speculation, this reasoning cannot support a compensatory sanctions award under the inherent powers. As Judge Watford highlighted, "the only relevant data point in the record supports the opposite conclusion" from that reached by the district court. *Id.* at 46a. When Goodyear did produce the Heat Rise test in other cases, there was no immediate settlement—one case went through trial and the other settled as trial was poised to begin.

Disclosure of the test results would not have prevented Goodyear from continuing to defend the case because, unlike the petitioner in *Chambers*, Goodyear had good faith defenses to Plaintiffs' claims: "The test results did not provide conclusive proof that the Haegers' tire failed due to its defective design." Pet. App. 45a (Watford, J., dissenting). *Cf. Browning*, 931 F.2d at 346 (vacating award of all fees because "[e]xcept when the entire course of

proceedings were unwarranted and should neither have been commenced nor persisted in, an award under § 1927 may not shift the entire financial burden of an action's defense"). In fact, the district court declined to find the Heat Rise test conclusive, and instead simply deemed it "relevant." Pet. App. 129a. Relevant evidence generally does not dictate immediate capitulation.

Allowing speculation to support a sanctions award simply masks sanctions that are truly punitive. Judge Watford acknowledged that the ultimate amount awarded under a causation analysis might seem inadequate to the district court. Pet. App. 50a. But vindicating a court's desire to punish without the protections of criminal contempt renders the award impermissibly criminal and does not reflect a regime with any true constraints.

B. Failure To Require Direct Causation Creates an Unworkable Standard Without Meaningful Checks

1. Underscoring these points, the Ninth Circuit majority offered no real answer to how an inherent authority sanctions regime could be limited or even applied without requiring a direct link between misconduct and a fee award. The court tried to articulate a standard for inherent authority sanctions by borrowing the "frequen[t] and sever[e]" abuses language from *Chambers*. Pet. App. 32a-34a. But the suggestion that a pattern of misconduct might justify an award of all the other party's fees is neither a standard nor a practical limitation at all. Likewise, the district court's proposed distinction between "truly egregious" cases (which, in its view, obviated any causation analysis) and "less egregious" cases (which might require some type of tailoring) is

equally untenable. *Id.* at 157-58a. These attempts at divining a substitute standard for causation would offer no guidance to federal courts—other than perhaps an assurance that they could award whatever sanction they wanted.

The notion that it should be easier for a court to impose free-wheeling sanctions in more complex or egregious cases also cannot be squared with this Court's precedent. *Bagwell* established that heightened procedural protections are even more important for "out-of-court disobedience" in a "complex" case that "require[s] elaborate and reliable factfinding." 512 U.S. at 833-34. Faced with 400 instances of contempt, *Bagwell* emphasized that "disinterested factfinding and evenhanded adjudication [a]re essential" where a court has "effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed." *Id.* at 837-38.

The Court concluded that the protections of a jury trial are all the more necessary in these circumstances, where the conduct may be "widespread" and the "fines assessed were serious." *Id.* at 837; *see also id.* at 843 (Scalia, J. concurring) (stressing the importance of "the factfinding protections of the criminal law"). In light of these concerns, fee shifting under inherent powers should not permit a broader recovery than the ostensibly "more drastic" contempt sanction. *Chambers*, 501 U.S. at 46 (quoting *Hutto*, 437 U.S. at 689 n.14).

Perhaps more troubling, the absence of a causation requirement pries open the door to an almost boundless view of monetary awards under inherent authority. The Ninth Circuit majority took a step in that direction, implying that lost settlement value

might justify a high sanctions amount. Pet. App. 30a. But going beyond fees would be the equivalent of transforming an inherent powers sanctions award into a tort remedy, creating a host of proof and due process problems, *see also* Pet. App. 50a (Watford, J., dissenting) (noting that such a remedy would be "obviously fraught with proof problems"), and expanding inherent authority sanctions well beyond the bounds ever recognized by this Court. Yet the Ninth Circuit has seemed to embrace a tort-like vision of inherent authority sanctions in prior cases. *See B.K.B.* v. *Maui Police Dept.*, 276 F.3d 1091, 1108-09 (9th Cir. 2002) (affirming award of "compensatory damages" sanctions under inherent power for "the embarrassment and pain suffered by Plaintiff").

Not only does some nebulous tort remedy represent a radical expansion of inherent authority sanctions, but it also raises the risk of duplicative recovery or inconsistent standards, all of which implicate due process concerns. Other mechanisms exist for parties to pursue such relief if they would otherwise be entitled to it. Confirming the point, Plaintiffs here have sued Goodyear and others for fraud and abuse of process in state court. In that action, Plaintiffs seek the very damages to which the Ninth Circuit alluded. Inherent authority should not be viewed as an excuse to create new causes of actions and novel damages remedies, unshackled by any realistic limitations.

2. Without restrictions on inherent authority, courts would wield "completely untrammeled power" without "effective safeguards." *Bloom*, 391 U.S. at 207. Sanctions carry wide-ranging nonmonetary consequences in addition to the pecuniary ones. They can be career-ending (ER1286-89) and haunt

parties in subsequent litigation. Pet. App. 170a. That is why the Court has reiterated the need for "restraint and discretion" in their application. But that admonition does not tangibly restrain courts, and the other existing checks on the sanctioning power (apart from causation) suffer from flaws that often render them inadequate. *See* Robert J. Pushaw, Jr., *Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739, 765 (2001) (describing federal courts' "broad and virtually unreviewable inherent authority" and arguing that "the sanctioning power itself has long been exercised arbitrarily").

The need for direct causation is highlighted by the abuse of discretion standard, which generally insulates sanctions awards from exacting appellate scrutiny. Under the abuse of discretion standard, it is difficult to envision how the amount of any monetary sanction would be subject to reversal if causation is eliminated as a constraint. Illustrating the point, in *Williamson* v. *Dispatch Printing Co.*, 826 F.3d 297, 306 (6th Cir. 2016), the Sixth Circuit rejected a "perfect causal connection between the sanctioned conduct and the attorney's fees awarded," but failed to offer a meaningful alternative. Instead, it suggested that inherent authority "sanctions cannot be so unreasonable that they constitute an abuse of discretion." *Id.* But this is circular. Like the Ninth Circuit, such a "know-it-when-you-see-it" approach to the amount of sanctions offers no guidance (or protection) to litigants or federal courts. And it is rife with the potential for abuse. *See Mackler Prods.*, 146 F.3d at 130 (noting the perils "if courts were to operate without any framework of rules or cap on their power to punish").

The challenges of this standard were on vivid display in this case. The Ninth Circuit majority was highly deferential to the district court's calculation of the award, affirming an almost $3 million sanction because the district court "reasonably believed" it was appropriate (in a one-paragraph analysis of the amount). Pet. App. 33a. Announcing that "[n]othing more is required," the court of appeals did not parse the awarded fees. *Id.* A causation standard would obligate the reviewing court to take a closer look. It would also force the district court to make a clear record for the amount of fees, enabling more effective appellate review.

A direct causation requirement also will help focus scrutiny on the underlying conduct—which did not happen in this case. Conflating Goodyear's conduct with that of its counsel, the court of appeals devoted only one paragraph to the specific misconduct alleged against Goodyear (as opposed to counsel), Pet. App. 25-26a, failing to address Goodyear's arguments on the substance of its actions. For example, the district court condemned Ms. Okey for claiming that a court order in another case required production of "all tests," when Plaintiffs characterized the order in the same way. *Compare* Pet. App. 133a *with* ER1121. The court also blamed her for (truthfully) stating that a discovery request asked for "heat" testing. *Compare* Pet. App. 133a-134a *with* ER704-05. Such details might get swept under the rug in an abuse of discretion review, but direct causation would help ensure a more meaningful appraisal of the substance as well as damages.

3. Similarly, the requirement of "bad faith," which serves as the primary limit on inherent authority sanctions, poses two problems. First, it

does not provide any guidance or direction on the amount of sanctions to impose. The bad faith standard only applies to ascertaining whether the conduct at issue is sanctionable.

Second, Justice Kennedy's dissent in *Chambers* served as a harbinger for the difficulties faced by the lower courts when he warned that "[t]he only limitation on this sanctioning authority appears to be a finding at some point of 'bad faith,' a standard the Court fails to define." 501 U.S. at 63 (Kennedy, J., dissenting). Courts have, somewhat predictably, struggled with applying this bad faith standard. The Sixth Circuit recently noted that (almost two decades post-*Chambers*) there was still "confusion" in its case law on the standard for bad faith relating to inherent authority sanctions. *BDT Products, Inc.* v. *Lexmark Int'l, Inc.*, 602 F.3d 742, 752-53 (6th Cir. 2010). It purportedly resolved that confusion by creating a "something more" test, requiring "something more" than simply pursuit of meritless claims to warrant sanctions. *Id.* But this "something more" test exemplifies, rather than resolves, the problem. *See also Fink* v. *Gomez*, 239 F.3d 989, 993 (9th Cir. 2001) (noting that "with respect to standards for sanctions under the court's inherent power . . . . some confusion is understandable"). Such confusion confirms that the "bad faith" requirement, viewed through the abuse of discretion lens, does not serve as a sufficient check on a district court's power to impose inherent authority sanctions or on their amount. Causation is thus needed to enhance the effectiveness of the bad faith requirement.

4. In the end, the lack of a direct causation requirement would turn inherent authority sanctions into a crutch for federal courts. Lax restrictions

create incentives for courts to evade the strictures of the other, more specific sanctioning regimes, with confusion currently punctuating the circuits on this point. *Compare First Bank* v. *Hartford Underwriters Ins. Co.*, 307 F.3d 501, 513 (6th Cir. 2002) ("We do not interpret *Chambers* to require the district court, in every instance, to exhaust consideration of sanctions under other relevant rules and/or statutes.") *with Montrose Med. Group Participating Sav. Plan* v. *Bulger*, 243 F.3d 773, 785 (3d Cir. 2001) (reversing sanctions under inherent powers because the district court did not consider whether any rule or statute covered the conduct); *ClearValue, Inc.* v. *Pearl River Polymers, Inc.*, 560 F.3d 1291, 1309 (Fed. Cir. 2009) (holding that it was abuse of discretion to sanction discovery violation under inherent powers because "[d]iscovery violations are appropriately addressed through the application of Rule 37").

If there is no limit on fees imposed under inherent powers, courts operating under a deferential standard of review are free to invoke their inherent powers to avoid the requirements of other regimes and insulate their awards from realistic scrutiny. As with the district court in *Aleo*, 681 F.3d at 307, inherent authority then serves as a reservoir of power when applying the rules or statutes proves difficult or inconvenient. Forcing courts to apply direct causation, however, will require them to appropriately tailor their sanctions when using their inherent powers (consistent with the mandates under the other sanctioning regimes).

As this Court underscored in *Bloom*, 391 U.S. at 208, genuine respect for courts "will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those

institutionalized procedures which have been worked out over the centuries." *Bloom* further explained that when a contempt charge was serious, "considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power." *Id.* at 209.

Those admonitions certainly ring true for attorney's fees sanctions under inherent authority as well. A causation requirement helps ensure that inherent authority sanctions are exercised with "restraint and discretion," *Roadway Express*, 447 U.S. at 764, and do not become a "roving authority" to award any amount of fees that the district court desires, *Alyeska*, 421 U.S. at 260.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court reverse the Ninth Circuit, vacate the award of attorney's fees, and remand with instructions to apply a direct causation standard for inherent authority sanctions as set forth in this Court's opinion.

Dated: November 14, 2016

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RECORD AND BRIEFS

No. 15-1406

In The

Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE CASE

A. Introduction.

The District Court expressly found that Goodyear's intentional concealment of critical internal test results (and related deceits) constitute "a years-long course of misconduct," Pet. App. 151a, which "continued throughout the entire litigation, including post-dismissal," *id.* at 159a. Indeed, the District Court found that Goodyear's egregious misconduct "permeated the entirety of this case," *id.* at 180a, and the Ninth Circuit determined "there is no doubt that Sanctionees' bad faith conduct . . . forc[ed] the Haegers to engage in sham litigation," *id.* at 30a. Because the frequency and severity of Goodyear's misconduct affected the entirety of the litigation, the District Court awarded the Haegers almost the entire amount of attorney's fees and costs they incurred after the point in the litigation when it first became clear (with the benefit of hindsight) that "Goodyear and its attorneys were not acting in good faith." *Id.* at 152a-153a; J.A. 107.

B. Goodyear's Concealment of Critical Test Results Caused this Case to be Litigated and Eventually Settled Based on a False Set of Facts.

The Haegers commenced this action against Goodyear in June 2005, alleging that defects in the design of Goodyear's G159 tire resulted in a motor home accident which caused severe harm to the Haegers. Pet.

App. 8a. The Haegers' theory was that the G159 tire was originally designed for start-and-stop use on city delivery trucks, and that when Goodyear began selling the G159 tire for use on motor homes at highway speeds, the tire produces a level of heat which it was not designed to endure, causing the tire to separate and fail. *Id.* at 9a, 86a.

Goodyear's own experts admitted during this litigation (but not in the other G159 cases throughout the country) that "heat in excess of 200 degrees for a prolonged period of time . . . can lead to tread separations" in the G159 tire. *Id.* at 144a-145a; ER165, ER220. But when the Haegers asked Goodyear, throughout the discovery process, to produce its internal test results for the G159 tire, including the tests that would reveal the tire's temperature when operated at highway speeds, Pet. App. 85a-86a, 89a-91a, 98a, 105a, 108a-110a, Goodyear intentionally concealed that information, and falsely represented that it had provided all the responsive test results that existed, *id.* at 88a, 91a-94a, 97a-104a, 111a-112a, 159a-166a.

Nearly the entire five years of litigation in the District Court and the Haegers' settlement with Goodyear on April 14, 2010, the day trial was scheduled to begin, were based on this false set of facts which Goodyear had created. *Id.* at 13a, 65a. When Goodyear was later caught committing this fraud, the concealed tests revealed that (in addition to knowing that the G159 tire was not designed to withstand temperatures above 200 degrees) Goodyear also knew that the G159 tire in fact

generated temperatures far in excess of 200 degrees when operated at highway speeds. *Id.* at 67a-68a.

C. The District Court Imposed Compensatory Sanctions for Most of the Fees and Costs the Haegers Incurred Because Goodyear's Misconduct "Permeated the Entirety of this Case."

Sometime after the settlement, the Haegers' counsel saw an article stating that Goodyear had produced in a Florida suit ("*Schalmo v. Goodyear*") internal heat and speed testing related to the G159 tire which the Haegers had repeatedly requested, never received and were assured by Goodyear did not exist. *Id.* Goodyear eventually admitted that the tests produced in *Schalmo v. Goodyear* had not been disclosed in this case, but Goodyear and its attorneys attempted to excuse that concealment with a "dizzying array of misstatements and simple falsehoods." *Id.* at 137a.

The Haegers filed a motion for sanctions on May 31, 2011. *Id.* at 125a; ER707-721; SER331-422. After Goodyear filed its response, the Haegers asked the District Court to order Goodyear to produce "the requested tests." Pet. App. 127a; ER319-326. On October 5, 2011, the District Court concluded there were "serious questions regarding [Goodyear's] conduct in this case" and ordered Goodyear to produce "the test results at issue." Pet. App. 14a, 128a; ER571-572. Even then, Goodyear disclosed only the results of a single test (the Heat Rise test), "but kept numerous other tests concealed" which

also showed temperatures well in excess of 200 degrees when the tire is operated at highway speeds. Pet. App. 128a. Goodyear later inadvertently disclosed the existence of these additional tests, as the District Court found, "only as a result of Goodyear's inability to keep its falsehoods straight." *Id.* at 135a; ER409-412. After obtaining the Heat Rise test results, the Haegers filed their reply in support of the motion for sanctions. *Id.* at 128a; SER798-871.

On February 24, 2012, the District Court issued an order to which it attached "the Court's proposed findings of fact and conclusions of law regarding [the Haegers'] motion for sanctions," Pet. App. 51a-82a, and by which it gave Goodyear and its attorneys an opportunity to file "either joint or separate briefs . . . addressing the Court's proposed findings of fact and conclusions of law." ER534. The proposed findings of fact and conclusions of law described possible sanctionable misconduct, but also stated that the record to that point did not "indicate who is responsible for each instance of misconduct nor does it indicate the appropriate amount to be awarded." Pet. App. 14a, 81a-82a. Accordingly, the District Court allowed Goodyear and its attorneys multiple opportunities, between March and July of 2012, to respond to the matters addressed in the proposed order, which responses totaled more than 1,100 pages.[1]

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[1] ER288-339, ER340-356, ER357-372, ER395-408, ER409-412, ER413-496, ER497-510, ER511-533, ER573-706, ER873-1065, ER1066-1085, ER1086-1108, ER1200-1242, ER1247-1250, ER2163-2250, ER2392-2513, ER2541-2595, ER2596-2600,

On March 22, 2012, the District Court held an evidentiary hearing, at which Goodyear's outside counsel (national coordinating counsel, Basil Musnuff, and local counsel, Graeme Hancock) testified under oath. ER87-285. At the conclusion of that hearing, the District Court allowed the Haegers to conduct additional discovery to address representations made at the hearing. ER270-284.

On November 8, 2012, the District Court issued a 66-page order, carefully cataloging the sanctionable misconduct, which included concealing critical test results, making intentional misrepresentations to the District Court and the Haegers throughout the entire litigation, and even lying to the District Court during the sanctions proceedings. Pet. App. 83a-172a. The District Court's findings specifically as to Goodyear's own bad faith conduct included the following:

- Goodyear's in-house attorney, Deborah Okey, "retained final say regarding discovery responses." *Id.* at 139a. "Ms. Okey was always the final decision maker regarding discovery responses." *Id.* at 88a. The District Court found that Goodyear's objections to the Haegers' discovery requests – which Ms. Okey reviewed and approved – were "not made in good faith." *Id.* at 160a-163a.

- After failed attempts to justify its deceptions, Goodyear ultimately admitted the concealed

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SER082-127, SER277-303, SER304-318, SER917-931, SER953-973, SER974-996, SER997-1017, SER1018-1035.

tests should have been produced in response to the Haegers' First Request. ER292.

- Even though both Musnuff and Hancock recommended to Goodyear that Goodyear's responses to the Haeger's First Request should be supplemented with testing of the tire at various speeds, "the record is clear . . . that no supplementation ever occurred." Pet. App. 93a-94a.

- Ms. Okey knew that Goodyear's responses "were grossly inaccurate." *Id.* at 139a. She also "knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior." *Id.* at 164a.

- "[T]he repeated representations by Goodyear . . . that Plaintiffs did not state the legal theory of this case until January 7, 2007 is incorrect . . . and now appears to have been part of a general strategy to obstruct and delay discovery." *Id.* at 87a, n.5.

- "[D]espite knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith." *Id.* at 163a.

- "Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask [the District] Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. . . .

[T]his means Goodyear . . . knowingly concealed documents in the present litigation." *Id.* at 122a.

- During the sanction proceedings, Ms. Okey made statements in a sworn declaration regarding production of test data which the District Court found "were either misleading or false." *Id.* at 133a.

- "It is now clear that Goodyear's 30(b)(6) witness [Richard Olsen] testified falsely at his deposition regarding the [concealed tests]. Therefore, the claim that Goodyear itself did not deliberately conceal *any* 'G159 Tire test results' is not true." *Id.* at 139a (emphasis in original); *see also id.* at 166a. When Mr. Olsen offered a declaration in the sanctions proceedings in an attempt "to explain how his testimony during his deposition was accurate . . . Mr. Olsen accidentally revealed it was not." *Id.* at 134a. "In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity emerged only as a result of Goodyear's inability to keep its falsehoods straight. . . . The only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith." *Id.* at 135a-136a.

- "Goodyear employees knew the Heat Rise tests and other tests were responsive to the [Plaintiffs'] Third Request. There is no acceptable justification for the failure to provide all responsive documents to the Third Request." *Id.* at 165a. "Goodyear engaged in a bad faith attempt to conceal documents when

they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request." *Id.* at 164a.

- Goodyear's "outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests." *Id.* at 169a.
- "Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, . . . Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior." *Id.* at 150a-151a.
- When the District Court ordered Goodyear to produce "the test results at issue" during the sanction proceedings, Goodyear continued to conceal most of them. *Id.* at 128a.

In sum, the District Court found that Goodyear's misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal." *Id.* at 159a.

The District Court then turned to the task of crafting an appropriate sanction to address Goodyear's misconduct, pursuant to the District Court's inherent

power. As to monetary sanctions, the District Court focused solely on compensatory sanctions; indeed, it expressly recognized that "large non-compensatory monetary sanctions 'are akin to criminal contempt and may be imposed only by following the procedures applicable to criminal cases, including appointment of an independent prosecutor, proof beyond a reasonable doubt and a jury trial.'" *Id.* at 158a (quoting *Miller v. City of Los Angeles*, 661 F.3d 1024, 1030 (9th Cir. 2011)).

The District Court determined that "[i]n these circumstances, the most appropriate sanction is to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request" for production of all test results, which supplemental responses were served on November 1, 2006. *Id.* at 89a, 152a (emphasis in original). The District Court selected that date as the starting point for compensating the Haegers because Goodyear's supplemental responses were the "first definitive proof" that Goodyear was going to fraudulently conceal the critical testing evidence. *Id.* at 153a. The District Court also emphasized that this case did not involve a single, discrete instance of misconduct, but rather a "years-long course of misconduct" which "continued throughout the entire litigation." *Id.* at 151a, 159a.

The Haegers filed their application for attorney's fees and costs on December 13, 2012, demonstrating that they had incurred a total of $2,884,057.39 since November 1, 2006. J.A. 54-57; ER1642-1918. In its

response to that application, Goodyear argued that the Haegers were entitled to recover only those fees and costs "resulting from Goodyear's allegedly sanctionable conduct," J.A. 68, and Goodyear specifically argued that some of the fees and costs for which the Haegers sought reimbursement were not causally linked to that misconduct. J.A. 59 (arguing that some of "the time entries submitted by plaintiffs . . . fall well outside the legitimate scope of . . . Goodyear's allegedly sanctionable conduct"). However, Goodyear argued that only $722,406.52 of the fees and costs the Haegers requested are "unrelated to the alleged harm" caused by Goodyear's misconduct. J.A. 68-71; ER1393; *see also* ER1369 (Mr. Hancock similarly argued that the same $722,406.52 amount was "not directly attributable to sanctioned conduct"). Significantly, Goodyear failed to argue in the District Court that the other fees and costs the Haegers sought are not causally connected to Goodyear's misconduct.

After the District Court had "spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award," Pet. App. 176a (emphasis in original), the District Court deducted more than $140,000 from the amount the Haegers requested, and awarded a total of $2,741,201.16. *Id.* at 184a. The District Court held Goodyear jointly and severally liable (with Mr. Musnuff) for 80% of that amount. *Id.* at 185a.

Addressing the requirement that the fees and costs awarded be caused by the sanctionable misconduct, the District Court observed that "Ninth Circuit

case law does not provide clear guidance for remedying a years-long course of misconduct such as that presented here." *Id.* at 151a. In particular, the District Court noted that Ninth Circuit cases could be construed as requiring that each individual item of costs or attorney's fees be linked to a particular instance of sanctionable misconduct. J.A. 107 ("Ninth Circuit authority might be read as limiting an award of sanctions to the harm *directly* caused by the misconduct.") (emphasis in original). But the District Court rejected this individualized direct-linkage concept because "it would be exceptionally difficult to link *each instance* of misconduct with the harm that misconduct caused," "[g]iven the breadth of the misconduct in this case." J.A. 107 (emphasis added). The District Court later elaborated:

> [I]n these unique circumstances, it is inappropriate to limit the award to the fees and costs that would be directly linked to the misconduct; proving that linkage is an almost impossible task given how the misconduct permeated the entirety of this case.

Pet. App. 180a. Instead, the District Court concluded that because Goodyear's misconduct "permeated the entirety of this case," almost the entire amount of attorneys' fees and costs the Haegers incurred were caused by that misconduct and could be appropriately awarded as sanctions. Pet. App. 157a-158a (relying on the award of sanctions of "the entire amount of . . . litigation costs" in *Chambers v. NASCO, Inc.*, 501 U.S. 32,

40, 56-57 (1991), based on the "frequency and severity" of the sanctionable misconduct).

Just in case it had erred in concluding that it was not required to find an individualized direct linkage between each item of litigation costs and a particular instance of sanctionable misconduct, the District Court made an alternative "contingent award." Pet. App. 180a. The contingent award further reduced the amount of attorney's fees and costs the Haegers sought by $722,406.52 (representing the only attorney's fees and costs which Goodyear argued did not satisfy the causation requirement because they are "unrelated to the alleged harm" caused by the sanctionable misconduct). *Id.*; J.A. 107-08. The District Court intended that the alternative award would apply only if an appellate court overturned the larger amount awarded to the Haegers, thereby "prevent[ing] the need for future proceedings." J.A. 107-08.

D. The Ninth Circuit Agreed the Sanction Award Is Compensatory, Concluding that Goodyear's Misconduct Rendered the District Court Proceedings Merely a "Sham Litigation."

The Ninth Circuit unanimously upheld the District Court's findings that Goodyear (and its attorneys) engaged in bad faith, sanctionable misconduct. Pet. App. 18a ("the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case"); *id.* at 43a (Watford, J., dissenting) ("I agree with the majority that the district

court's misconduct findings are supported by the record"). The panel also unanimously upheld the District Court's use of its inherent power to impose sanctions. *Id.* at 21a ("We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case. . . ."); *id.* at 43a (Watford, J., dissenting) ("The district court's finding of bad faith authorized it to levy sanctions under its inherent power.").

The panel also agreed that the fees and costs awarded needed to be caused by the sanctioned misconduct in order to be compensatory. *Id.* at 30a ("[T]here is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation. . . .") (emphasis added). Indeed, the majority went on to "consider how close a *link* is required between the harm caused and the *compensatory* sanctions awarded when a court invokes its inherent power." *Id.* at 30a (emphasis added).

The majority and the dissent parted ways not on whether a causal link was required but only on whether the evidence in the record is sufficient to satisfy the causal link requirement. The dissent concluded: "The record in this case is . . . devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded." *Id.* at 45a (Watford, J., dissenting). By contrast, the majority held that "the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to *compensate* the Plaintiffs for

the damages they suffered *as a result of* Sanctionees' bad faith." *Id.* at 28a (emphasis added).

SUMMARY OF ARGUMENT

Contrary to Goodyear's assertions, neither the Ninth Circuit nor the District Court rejected the requirement that the attorney's fees and costs awarded to the Haegers must be caused by Goodyear's misconduct. Instead, the lower courts found that requirement was fully satisfied. The District Court rejected only Goodyear's proposal for an additional requirement: that the District Court must determine a specific "direct" linkage for each individual expenditure of fees and costs with a particular instance of misconduct.

The District Court's findings that Goodyear's misconduct was not a simple discovery violation (as Goodyear suggests) but constitutes "a years-long course of misconduct" which "continued throughout the entire litigation," and "permeated the entirety of this case" are unchallenged and unchallengeable. Because the District Court appropriately found that Goodyear's egregious misconduct affected the "entire litigation," that finding is more than sufficient to support an award of most of the attorney's fees and costs the Haegers were forced to incur throughout the entire litigation. Similarly, the District Court's finding that the case "more likely than not would have settled much earlier" if Goodyear had not acted in bad faith, thereby

avoiding subsequent fees and costs, also supports the required causal nexus in this case.

Goodyear's misconduct was so frequent and severe that it converted the entire litigation into a sham, based on a false set of facts which Goodyear had intentionally created. As a result, all the efforts undertaken, all the depositions taken, all the motions filed, and ultimately even the settlement of the case all "took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist," but such test results did exist. Accordingly, the Haegers are forced to start anew to assert their claims against Goodyear based on the truth (not Goodyear's fraudulent scenario).[2] Therefore, the attorney's fees and costs incurred in this sham litigation were all caused by Goodyear's misconduct and should be upheld.

Goodyear's proposed new requirement that District Courts must find a specific "direct" linkage for each individual expenditure of fees and costs with a particular instance of misconduct is not supported by existing law. This Court's prior decisions related to sanctions under inherent power do not support Goodyear's direct-linkage argument. Nor do the circuit

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[2] Goodyear asserts that the Haegers seek to recover "the same fees and costs that were awarded in this case" in a new lawsuit filed in state court. Petitioner's Brief at 6. This assertion is not supported by any citation to the record and is not true. The Haegers do not seek to recover the same damages twice; instead, their subsequent state court action seeks to recover other damages of which they were deprived as a result of Goodyear's fraud.

court cases on which Goodyear relies. Goodyear's proposed requirement would do little more than foster needless satellite litigation and make the already-difficult and time-consuming job of investigating and sanctioning bad-faith conduct even more difficult.

Even if the District Court erred in rejecting Goodyear's additional direct-linkage requirement, remand to the District Court for further proceedings would not be needed here. Goodyear's causation challenge in the District Court was limited to specific attorney's fees and costs totaling just $722,406.52. Taking Goodyear at its word, the District Court made an alternative "contingent award" which reduced the sanctions award by that amount, which the District Court intended to apply only if an appellate court overturned the larger award. Because Goodyear did not challenge the other fees and costs awarded on the basis of causation in the District Court, Goodyear has waived that argument, and should not be permitted to raise it for the first time on appeal.

Accordingly, the Ninth Circuit's decision upholding the sanctions award should be affirmed. But even if the Court accepts Goodyear's argument that something more is required, the alternative contingent award should be applied, making remand unnecessary.

ARGUMENT

I. The Ninth Circuit Acknowledged the Causal-Link Requirement, and Determined that Requirement Was Fully Satisfied.

Goodyear devotes a large portion of its brief to the contention that fees and costs awarded as compensatory sanctions under a court's inherent power (as in this case) must be causally linked to the sanctioned misconduct. But Goodyear's arguments are premised on its false assertion that the Ninth Circuit "refused to apply *any* causation requirement to the sanctions imposed." Petitioner's Brief at 8 (emphasis added); *see also id.* at 23 (asserting that the Ninth Circuit "reject[ed] a causation test"); *id.* at 27 ("[T]he Ninth Circuit erred in relying on *Chambers* to eliminate causation for inherent authority sanctions."); *id.* at 32 ("the Ninth Circuit majority refused to apply a causation limitation").[3]

Far from rejecting "any causation requirement," the Ninth Circuit expressly concluded that "there is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation," Pet. App. 30a (emphasis added), and

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[3] Following Goodyear's lead, *amici curiae* in support of Goodyear adopt the same erroneous premise that the Ninth Circuit refused to apply any causation requirement. *See* American Bar Association Brief at 6-7 (asserting that the District Court is required to find causation (not "direct" causation as Goodyear contends), but "the Ninth Circuit held that no such effort is required"); National Association of Manufacturers Brief at 2 (asserting that the District Court "abrogated its responsibility" to find causation).

that "the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to *compensate* the Plaintiffs for the damages they suffered *as a result of* Sanctionees' bad faith," *id.* at 28a (emphasis added). In fact, not only did the Ninth Circuit acknowledge the causal-link requirement in this case, but it also went on to carefully "consider *how close a link is required* between the harm caused and the compensatory sanctions awarded when a court invokes its inherent power." *Id.* at 30a (emphasis added).[4]

The District Court similarly did not "refuse[] to apply any causation requirement." Petitioner's Brief at 8. Instead, it rejected only the additional requirement which Goodyear proposes, that the harm be "directly caused" by the misconduct, such that an award of all or most of the fees and costs incurred cannot be awarded in cases, like this one, in which the misconduct is so frequent and severe as to "permeate[] the entirety of [the] case." J.A. 107; Pet. App. 151a-152a, 157a, 180a.[5]

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[4] In an effort to find support for its erroneous assertion that the Ninth Circuit refused to apply "any causation requirement," Goodyear resorts to partial quotes of the Ninth Circuit's decision. For example, Goodyear asserts: "Nowhere in *Chambers* does the Court 'expressly reject[] the linkage argument,' as the Ninth Circuit posited." Petitioner's Brief at 24. But the Ninth Circuit "posited" no such thing. The Ninth Circuit did not say that *Chambers* rejected any linkage requirement (as Goodyear accuses). Instead, the Ninth Circuit said that the *Chambers* merely "rejected the linkage argument *made by the Sanctionees here*." Pet. App. 32a (emphasis added).

[5] Goodyear also erroneously asserts that the Haegers "made no attempt to establish a causal link in their subsequent fee application." Petitioner's Brief at 33. The record proves otherwise.

Thus, Goodyear's extensive arguments about the lower courts' supposed rejection of a causation requirement, the underlying justification for that requirement and the negative effects that could happen if a court were to impose sanctions without any causation limitation are red herrings. Neither the Haegers nor the Ninth Circuit dispute that fees and costs awarded as sanctions under a court's inherent power must be causally connected to the bad-faith misconduct. The real question to be decided[6] – and the only issue on which the Ninth Circuit panel members parted ways – is how close a link is required and whether the facts in this case (as found by the District Court) meet that standard.

J.A. 84-86; *see also* ER1187 (the Haegers argued that "Goodyear's fraudulent acts changed the entire landscape" of the litigation, and if Goodyear had not acted in bad faith, "this action would have followed an entirely different and much shorter path").

[6] Throughout its brief, Goodyear inappropriately blends in discussion of issues which are unrelated to the sole issue on which this Court granted review. For example, Goodyear hints at whether Goodyear acted in bad faith, whether a court may employ inherent power when other sanction mechanisms might cover some or all of the misconduct, and whether the limits and restrictions of other sanction mechanisms must be followed when applying inherent powers. *See, e.g.*, Petitioner's Brief at 15-16, 21. Goodyear even accuses the Ninth Circuit of holding it responsible for its outside attorneys' bad-faith conduct – an issue which Goodyear expressly raised in its petition for writ of certiorari, and on which this Court denied review. Petitioner's Brief at 42. These improper arguments should be ignored.

II. The District Court's Unchallenged Findings Are Sufficient to Satisfy the Causal-Link Requirement.

For the vast majority of cases, the undisputed requirement that compensatory sanctions must be causally linked to the sanctioned behavior is straightforward. For example, if a party files a frivolous motion, the harm caused to the opposing party will likely be limited to just the attorney's fees and costs incurred in opposing that specific motion. But when the sanctionable misconduct is not limited to a single, discrete instance (or even a few instances), but rather is so pervasive and severe as to fundamentally undermine or otherwise affect the *entire* litigation, then an award of the *entire* amount of attorney's fees and costs incurred by the victimized party may be appropriate to fairly compensate that party.

In this case, the District Court relied on two alternative findings to support the causal-link requirement and award almost the entire amount of attorney's fees and costs the Haegers incurred throughout the litigation. First, the District Court found that Goodyear's fraudulent concealment of critical test evidence "began almost immediately after the case was filed and continued throughout the entire litigation" and "permeated the entirety of this case." Pet. App. 159a, 180a. Second, the District Court found that this "case more likely than not would have settled much earlier" if Goodyear had not acted in bad faith and promptly disclosed the damning evidence. *Id.* at 152a. Goodyear did not challenge these findings, and they are not clearly erroneous in any event. Accordingly, each is a sufficient basis to satisfy the causal-link requirement.

A. The District Court's Findings Are Unchallenged and Not Clearly Erroneous in Any Event.

The law is "well settled . . . that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses.'" *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Fed. R. Civ. P. 52(a)). Under this "deferential" standard, "'[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)). This is true even when "there is significant evidence in the record to support" the appellate court's contrary view. *Id.* at 225-26 ("We have frequently emphasized that '[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.'").

As to most of the District Court's extensive, detailed findings, Goodyear did not even attempt to argue in the Ninth Circuit that they are clearly erroneous, nor would such an argument have been successful under the highly deferential standard. Therefore, this Court's review must be based on the District Court's findings of fact and the reasonable inferences from those facts, *see Link v. Wabash Railroad Co.*, 370 U.S. 626, 633 (1962) (reasonable inferences from the facts are sufficient to uphold a sanctions decision) – not

based on Goodyear's version of facts which, in many instances, the District Court specifically found to be unreasonable, not credible and even untruthful.

B. The District Court's Findings that Goodyear's Misconduct Affected the "Entire Litigation" Support a Causal Link to Nearly the Entire Fees and Costs the Haegers Incurred.

After considering the entire record, the District Court appropriately found that Goodyear's concealment of critical test results (and related deceptions) "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal." Pet. App. 159a. The District Court similarly found that Goodyear's "misconduct permeated the entirety of this case." *Id.* at 180a. In other words, the District Court properly found that, by concealing the damning test evidence from the Haegers and the District Court, Goodyear converted the entire litigation into an empty, make-believe exercise or a meaningless charade, based on Goodyear's fabricated fact scenario which had little to do with reality. As the Ninth Circuit put it, Goodyear's "bad faith conduct . . . forc[ed] the Haegers to engage in sham litigation." *Id.* at 30a. Thus, because Goodyear's misconduct "permeated" every aspect of the litigation, and turned the entire litigation into a sham, there is a sufficient causal link between that pervasive misconduct and almost all the fees and costs the Haegers incurred throughout the entire litigation.

The Court's holding in *Chambers v. NASCO*, 501 U.S. 32 (1991), supports this conclusion. The District Court in *Chambers* had relied on its inherent power to sanction Chambers more than $996,000, "which represented the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40 and n.5. Similar to the individualized linkage argument which the District Court rejected in this case, Chambers argued that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanctions to the particular wrong." *Id.* at 56. Rejecting that argument, this Court held:

> [T]he District Court concluded that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses of the judicial system and the resulting need to ensure that such abuses were not repeated. Indeed, the court found Chambers' actions were "part of [a] sordid scheme of deliberate misuse of the judicial process" designed "to defeat NASCO's claims by harassment, repeated and endless delay, mountainous expense and waste of financial resources." It is within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees.

Id. at 56-57 (citation omitted). Just as the "frequency and severity" of Goodyear's misconduct permeated this entire litigation, Chambers' "conduct throughout the lawsuit evidenced bad faith," and allowed the imposition of the sanction for the entire amount of litigation costs. *Id.* at 51.

Goodyear contends that the award of all litigation costs in *Chambers* satisfied the causation requirement because the Court found that "'all' of the conduct involved in that case was sanctionable." Petitioner's Brief at 10. This contention is clearly wrong because causation is not based on whether all of the sanctionee's conduct is sanctionable, but it is based on whether all the attorney's fees and costs awarded are causally linked to the sanctionable conduct. Thus, contrary to Goodyear's assertion, this Court upheld the sanctions award of all the litigation costs in *Chambers* because all the litigation costs were causally linked "due to the frequency and severity" of Chambers' misconduct. 501 U.S. at 56.

Goodyear also erroneously contends that the Ninth Circuit construed *Chambers* as creating "a separate category of inherent powers sanctions for misconduct involving widespread abuses that are free from any causation constraints." Petitioner's Brief at 23. To the contrary, the Ninth Circuit simply recognized that when the misconduct is severe and pervasive, its causal effect can be much broader, justifying an award of more of the litigation costs. Indeed, when (as in this case) the misconduct is so extensive that it "permeate[s] the entirety of [the] case," then an award of the entire amount of fees and costs may be necessary to compensate for the effects of the misconduct.

Goodyear acknowledges that the fees "wasted on expert discovery that took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist" is one example of fees caused by Goodyear's misconduct, and therefore

may be awarded as sanctions under inherent power. Petitioner's Brief at 36 (quoting Pet. App. 50a (Watford, J., dissenting)). But the truth is that there was no aspect of this litigation which did not take place under the same mistaken assumption (at least until the Haegers learned of the concealed test results and filed their motion for sanctions). Thus, if Goodyear admits that the expert discovery was wasted because of Goodyear's misconduct, then the same logic applies to all the other aspects of the litigation which Goodyear's misconduct similarly caused to be wasted.

Goodyear's contention that there is no causal link between its misconduct and the fees and costs related to some aspects of the underlying litigation is an improper rejection of the District Court's express finding that Goodyear's misconduct "permeated the entirety of this case," not just some aspects of this case. Even if Goodyear's position were another plausible view, and even if there were some evidence to support this view, that does not mean that the District Court's finding is clearly erroneous or that the District Court abused its discretion in awarding almost all the fees and costs the Haegers incurred. *See Amadeo*, 486 U.S. at 223-26. Accordingly, the District Court's finding that Goodyear's misconduct "permeated the entirety of this case" is sufficient to satisfy the causal-link requirement for the compensatory sanctions the District Court awarded under its inherent power.

C. The Finding that the Case "More Likely Than Not Would Have Settled Much Earlier" If Goodyear Had Not Acted in Bad Faith Supports an Award of Nearly the Entire Fees and Costs.

While the District Court acknowledged that "there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith," it found that "the case more likely than not would have settled much earlier" if Goodyear had promptly disclosed the critical test results. Pet. App. 152a. Such an early settlement would obviously have made all the subsequent litigation costs unnecessary. *Id.* Thus, the District Court's finding that this case would have settled much earlier if Goodyear had acted in good faith also independently satisfies the causal-link requirement.

Goodyear does not argue that such a finding, when properly supported by the evidence, cannot satisfy the causal-link requirement. Instead, Goodyear simply argues that the record in this case does not support that finding. Goodyear is wrong.

First, Goodyear contends that "'the only relevant data point in the record supports the opposite conclusion' from that reached by the district court." Petitioner's Brief at 37 (quoting Pet. App. 46a). That "data point" is the fact Goodyear did not settle in *Schalmo v. Goodyear*, even though the tests concealed from the Haegers were disclosed in *Schalmo v. Goodyear*.

But Goodyear's argument ignores the District Court's explicit finding that "in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had 'said the tire would foreseeably fail at [temperatures] above 200 degrees.'" Pet. App. 145a (quoting ER230). The combination of the test results (which revealed that the G159 tire operated far in excess of 200 degrees at highway speeds) with the admission of Goodyear's own experts in the Haegers' suit (that the G159 tire would foreseeably fail when operated above 200 degrees) is what supports the District Court's finding that Goodyear more likely than not would have promptly settled the Haeger suit if Goodyear had not acted in bad faith by concealing the test results. While Goodyear did eventually disclose the test results in *Schalmo v. Goodyear*, it is undisputed that Goodyear did not disclose its experts' admission that operating the G159 tire above 200 degrees would foreseeably lead to failure. *Id.* Accordingly, *Schalmo v. Goodyear* does not provide a relevant data point of what Goodyear likely would do when its admission that the G159 tire is likely to fail at temperatures above 200 degrees is combined with evidence that the G159 tire did, in fact, operate far in excess of 200 degrees when used at highway speeds. That combination of admission with test results did not occur in *Schalmo v. Goodyear*, and there is no evidence that it ever occurred in any of Goodyear's G159 cases across the country.

Second, Goodyear also challenges the District Court's finding that Goodyear likely would have promptly settled if it had produced the concealed test

results by arguing that the "test results did not provide conclusive proof that the Haegers' tire failed due to its defective design." Petitioner's Brief at 37 (quoting Pet. App. 45a). Specifically, Goodyear argues that the District Court deemed the concealed tests to be merely "relevant." Petitioner's Brief at 38 (citing Pet. App. 129a). Again, Goodyear is wrong.

In the portion of the record on which Goodyear relies, the District Court did not limit itself to finding that the concealed test results were merely "relevant." Instead, the District Court rejected "the position now adopted by Goodyear and its counsel," that the Heat Rise tests are not even relevant to the Haegers' case. Pet. App. 129a ("[T]here can be no serious dispute that the Heat Rise tests were relevant to Plaintiffs' claims."). The District Court further explained that the argument that the Heat Rise tests are not even relevant is frivolous and further evidence of bad faith:

> Mr. Musnuff's claim that the Heat Rise tests were not even relevant to Plaintiffs' claim is frivolous. Mr. Musnuff knew Plaintiffs' theory and knew that Plaintiffs believed high temperatures caused tire separations. Mr. Musnuff also knew that Plaintiffs' expert had stated the temperatures at which tire degradation would occur and knew the temperatures Goodyear's own expert had testified about which would be cause for concern. Maintaining that the Heat Rise tests were irrelevant when they showed the temperature the G159 operated at when used at highway speeds is

> so obviously relevant that Mr. Musnuff's current position to the contrary is clear evidence he is operating in bad faith.

Id. at 146a-147a.

Moreover, Goodyear's assertion that the District Court characterized the concealed test results as merely relevant is not supported by the record. To the contrary, the District Court found that "Goodyear and its counsel knew Plaintiffs' liability theory and that heat would be a central issue," and therefore the concealed tests were "*crucial* documents" in this case. *Id.* at 86a, 122a (emphasis added).

Finally, Goodyear contends that the concealed test results were not "conclusive" and that it still would have had good faith defenses to the Haegers' claims even if it had not fraudulently withheld the test results. Petitioner's Brief at 37. But in light of the admission by Goodyear's own experts that operating the G159 tire in excess of 200 degrees makes it prone to failure, it is hard to imagine more "conclusive" evidence than Goodyear's internal test results which definitively show that Goodyear knew the G159 tire greatly exceeds 200 degrees when operated at highway speeds. Furthermore, the outrageous lengths to which Goodyear and its attorneys went to keep these test results hidden from the Haegers – even during the sanction proceedings in the District Court – is more than enough evidence to support the finding that Goodyear likely would have settled early in the litigation, and

thereby not forced the Haegers to waste a large amount of fees and costs in sham litigation.

Accordingly, the record in this case is sufficient to satisfy the causal-link requirement.

III. Goodyear's Arguments that the Haegers' Sanctions Award Was Required to Meet a Higher Causation Standard Have No Merit.

Goodyear goes beyond arguing that there is a causal-link requirement (a proposition which neither the Haegers nor the Ninth Circuit dispute), and asserts instead that the Court "should now formally recognize . . . that attorney's fee sanctions under inherent power are limited by a *direct* causation requirement." Petitioner's Brief at 11 (emphasis added). Goodyear offers no definition of what it means by "direct" in this context. Instead, Goodyear merely suggests that "[d]irect causation parallels the 'direct effect' test under Rule 11 and the 'but for' test recognized in *Fox* [*v. Vice*, 563 U.S. 826 (2011)], and thus should be familiar to federal courts." Petitioner's Brief at 34.

If Goodyear were using the term "direct" cause to mean merely that sanctions should be limited to expenses foreseeably incurred as a result of the sanctionable misconduct, akin to the concept of "proximate" cause used in tort law,[7] then the Haegers would have

---

[7] As Chief Justice Roberts recently explained:

> "'In a philosophical sense, the consequences of an act go forward to eternity.'" *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 266, n.10, . . .

no objection. But this would add little because the notion that the causal chain for sanctions cannot "extend indefinitely" is already incorporated into the Court's sanctions jurisprudence. *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990) (under a prior version of Rule 11 which allowed an award of expenses incurred "because of" a violation, the Court limited sanctions to expenses incurred at the trial court level because the conclusion "that expenses incurred 'because of' a baseless filing extend indefinitely" is overbroad and needs to be limited by concepts akin to proximate cause).

Moreover, a requirement that the harm be reasonably foreseeable would not affect this case at all. The District Court's finding that Goodyear's misconduct permeated the entire case and therefore caused the Haegers to waste nearly all of their fees and costs on sham litigation would easily qualify as foreseeable and therefore "direct" under this definition. But in any event, the District Court rejected the individualized linkage requirement, not a requirement that the harm be reasonably foreseeable.

> (1992) (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). Law, however, is not philosophy, and the concept of proximate cause developed at common law in response to the perceived need to distinguish "but for" cause from those more direct causes of injury that can form the basis for liability at law.

CSX Transp., Inc. v. McBride, 564 U.S. 685, 706-07 (2011) (Roberts, C.J., dissenting).

This Court's prior decisions related to sanctions under inherent power do not support Goodyear's direct-linkage argument. For example, this Court has long recognized that courts have inherent power to sanction a party who acts in bad faith by making the other party "whole for expenses *caused* by his opponent's" misconduct. *Hutto v. Finney*, 437 U.S. 678, 689, n.14 (1978) (emphasis added). *Hutto* did not further restrict the proper scope of sanctions to those "directly" linked to particular instances of misconduct.

Similarly, in *Chambers* the Court never qualified the causation requirement with a direct-linkage limitation. Instead, it upheld the trial court's award of all litigation costs based on the finding that "costs and expenses expended in this proceeding were *caused*" by Chambers. 501 U.S. at 58. And *Chambers* also relied on *Hutto* for the proposition that compensatory sanctions under a court's inherent power are intended to "mak[e] the prevailing party whole for expenses *caused* by his opponent's obstinacy." *Id.* at 46 (emphasis added) (quoting *Hutto*, 437 U.S. at 689, n.14).

Moreover, *Chambers* rejected the same direct-linkage argument which the District Court rejected here. Chambers argued that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanctions to the particular wrong." *Id.* at 56. The Court rejected that argument, upholding the trial court's finding that "full attorney's fees were warranted due to the frequency and severity of Chambers' abuses" and stating that "[i]t was within

the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* at 56-57.

Finally, contrary to Goodyear's assertions, nothing in *International Union v. Bagwell*, 512 U.S. 821 (1994), supports Goodyear's argument for a direct-linkage standard. Indeed, *Bagwell* does not address the causation standard for compensatory sanctions at all. The issue in *Bagwell* was "whether contempt fines levied against a union for violations of a labor injunction are coercive civil fines, or are criminal fines that constitutionally could be imposed only through a jury trial." *Id.* at 823. Because no one involved in *Bagwell* had contended that "the challenged fines are compensatory," and the trial court made no "attempt to calibrate the fines to damages caused by the union's contumacious activities or indicate that the fines were 'to compensate the complainant for losses sustained,'" the Court limited its analysis to "whether these fines, despite their noncompensatory character, are coercive civil or criminal sanctions." *Id.* at 834 (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947)). Consequently, *Bagwell* expressly left "unaltered the longstanding authority of judges . . . to enter broad *compensatory* awards for all contempts through civil proceedings." *Id.* at 838 (emphasis added).[8]

---

[8] Because *Bagwell* dealt with noncompensatory sanctions and expressly left "unaltered" the authority to impose compensatory sanctions as discussed in *Chambers*, there is no "tension" between *Chambers* and *Bagwell* as Goodyear suggests. Petitioner's Brief at 25.

The circuit court cases on which Goodyear relies also do not support its direct-linkage argument; indeed, they do not address anything like Goodyear's argument for "direct" causation. Instead, the cases support the conclusion that the sanctions award to the Haegers was compensatory because it was not payable to the court and the amount was intended to make the Haegers whole for losses incurred because of Goodyear's misconduct. *See, e.g.*, *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 129 (2d Cir. 1998) (holding that sanction was not compensatory because it was "payable to the court, rather than to the injured party" and "was not intended to be compensatory"); *Bradley v. American Household Inc.*, 378 F.3d 373, 378 (4th Cir. 2004) (holding that fines were not compensatory because they "were made payable to the court, not to the Bradleys" and "the amounts of the fines were not determined by reference to any losses incurred by the Bradleys"); *Crowe v. Smith*, 151 F.3d 217, 227 (5th Cir. 1998) (holding that fines were not compensatory because they "were payable to the court"); *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 808 (8th Cir. 2005) (holding that sanction was not compensatory because it was payable to the clerk of the court and was not based on the costs the court incurred because of the misconduct); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1138, 1142 (9th Cir. 2001) (holding that one sanction was not compensatory because it "was not intended to compensate Gordon but rather was made payable to the United States," but another sanction was compensatory because it was "payable to Gordon" and "was

meant to offset the expenses incurred because of Frederick's misconduct").

Some of the cases on which Goodyear relies actually support the sanctions award in this case. For example, in *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003), as the result of the plaintiff's intentional withholding of a medical report during discovery, the trial court imposed sanctions by dismissing the plaintiff's complaint and requiring the plaintiff and his counsel to pay the defendant's attorney's fees and costs incurred in bringing the motion to dismiss. The plaintiff and his counsel appealed, but the defendant cross-appealed, arguing that he should have been awarded all of his attorney's fees, and not just those related to his motion to dismiss. The Seventh Circuit rejected this argument because there was no reason to believe that the plaintiff's misconduct rendered "the suit as a whole" frivolous. *Id.* at 471. Similarly, the Fifth Circuit determined in *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991), that "[e]xcept when the entire course of proceedings were unwarranted and should neither have been commenced nor persisted in, an award under § 1927 may not shift the entire financial burden of an action's defense."

In contrast to *Maynard* and *Browning*, the courts below properly found that Goodyear's misconduct affected the entire litigation, and rendered it a sham. The District Court expressly found that Goodyear's misconduct "continued throughout the entire litigation" and "permeated the entirety of this case," and

substantial evidence in the record supports these findings. Pet. App. 159a, 180a.

Finally, Goodyear's reference to other types of sanctions mechanisms (Petitioner's Brief at 27-32) does not advance its position. As with sanctions based on a court's inherent power, 28 U.S.C. § 1927 does not qualify its causation requirement with a "direct" limitation. Section 1927 requires only that excess costs, expenses and attorney's fees "incurred because of such conduct" may be ordered – a simple causation statement. Likewise, the discovery rules referred to by Goodyear use the terminology "caused by" or "incurred in" to link the violation to the sanction award. Fed. R. Civ. P. 37 and 26(g)(3).

Rule 11 presents a fundamentally different situation because "the purpose of Rule 11 sanctions is to deter rather than to compensate" and monetary sanctions "should ordinarily be paid into court as a penalty." Fed. R. Civ. P. 11 Advisory Committee Note to 1993 amendments. Even when Rule 11 allows a monetary payment "under unusual circumstances" to another party, the purpose is still to make deterrence effective, but by imposing a sanction not "more severe than reasonably necessary to deter repetition of the conduct" by the party or others. *Id.*; Fed. R. Civ. P. 11(c)(4) and (5).

Accordingly, Goodyear's arguments and authorities do not support its contention that the Haegers' sanctions award had to meet a higher causation standard than the District Court applied. To the contrary,

"the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to compensate the Plaintiffs for the damages they suffered as a result of [Goodyear's] bad faith." Pet. App. 28a.

IV. Requiring Courts to Pinpoint Which Discrete Acts of Misconduct Caused Each Time Entry and Cost Would Frustrate Important Public Policies and Benefit Only Bad-Faith Litigants.

To the extent Goodyear contends that something more than the District Court's detailed findings in this case is required to justify an award of most of the attorney's fees and costs incurred in litigation, that contention should be rejected. Requiring a greater causal connection than found in this case would frustrate important public policies and benefit only litigants who act in bad faith.

When a court appropriately finds that frequent and severe bad-faith conduct permeates the entire litigation, requiring a more exacting causal linkage between the specific instances of misconduct and each individual time entry and expenditure "would serve only to foster extensive and needless satellite litigation." *Chambers*, 501 U.S. at 51. "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

Additionally, requiring more from trial court judges in cases like this one could have a chilling effect

on their undertaking the already-difficult and time-consuming task of investigating and sanctioning bad-faith conduct. In this case, the sanctions proceedings in the District Court spanned more than two years, from the filing of the Haegers' motion for sanctions on May 31, 2011, ER707-721, to the entry of the sanctions judgment on August 26, 2013. Pet. App. 173a-196a. During that timeframe, the District Court "approached the task of determining whether the charges were true with great thoroughness and care." *Id.* at 43a. Even after the District Court found that Goodyear had engaged in sanctionable misconduct, the District Court "spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award." *Id.* at 176a (emphasis in original). While this substantial commitment of time and effort to deal with bad-faith conduct may be unavoidable, adding to this heavy burden is not:

> But trial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time. And appellate courts must give substantial deference to these determinations, in light of "the district court's superior understanding of the litigation." We can hardly think of a sphere of judicial decisionmaking in which appellate micromanagement has less to recommend it.

Fox v. Vice, 563 U.S. 826, 838 (2011) (citations omitted).

Additionally, the burdens and adverse consequences of requiring a more exacting causal link in cases like this one is not offset by countervailing benefits. The bad-faith actor is already adequately protected. The determination of the amount of sanctions to award pursuant to a court's inherent power occurs only after the very high hurdle of finding that the sanctionee acted in bad faith in the first place. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66 (1980) (general rule that "a litigant cannot recover his counsel fees . . . does not apply when the opposing party has acted in bad faith"). Significantly, the requirement that the trial court first find that the sanctionee acted in bad faith is not a protection found in all sanctions mechanisms. *See, e.g.*, *Lew v. Kona Hospital*, 754 F.2d 1420, 1427 (9th Cir. 1985) (affirming sanction under Rule 37 because "[e]ven a negligent failure to allow reasonable discovery may be punished").

Moreover, contrary to Goodyear's argument, a finding that the misconduct was so frequent and severe as to "permeate" the entire case and permit an award of all or most of the attorney's fees and costs incurred in the litigation is subject to adequate review on appeal. If, for example, a trial court were to award all litigation costs against a party who merely filed a single frivolous motion, a reviewing court would likely have little trouble overturning that holding as clearly erroneous. But on the other hand, in cases such as this one, when a party fraudulently conceals crucial evidence throughout the entire litigation, repeatedly lies

about the existence of such evidence and engages in other deceptions, such that the bad-faith conduct reduces the litigation to a meaningless sham, an award of all or most of the attorney's fees and costs is well within the trial court's discretion. *See Chambers*, 501 U.S. at 55 ("[W]e find that the District Court acted within its discretion in assessing as a sanction for Chambers' bad-faith conduct the entire amount of NASCO's attorney's fees.").

Finally, the bad-faith actors are also protected by their right to object to any attorney's fees and costs which they believe are not caused by the sanctionable conduct. Indeed, in this case, Goodyear argued in the District Court that some of the attorney's fees and costs awarded to the Haegers did not satisfy the causal-link requirement. But Goodyear objected to only $722,406.52 of the fees and costs based on causation. Therefore, as discussed *infra* at § V, Goodyear should not be heard to raise, for the first time on appeal, a lack-of-causation objection to the fees and costs awarded to which it did not object in the District Court.

Accordingly, "the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to compensate the [Haegers] for the damages they suffered as a result of [Goodyear's] bad faith." Pet. App. 28a. Requiring that the District Court do something more is not only contrary to law, but it is also contrary to sound public policy.

V. Goodyear Waived Any Causation Argument Except as to the $722,406.52 of Fees and Costs to Which It Objected.

Even if it were true that the District Court in this case applied the wrong causal-link standard when it awarded almost all of the attorney's fees and costs the Haegers incurred, a remand to the District Court for further proceedings is not required. That is because the District Court made an alternative "contingent award" of sanctions, based on Goodyear's argument in the District Court that only $722,406.52 of the fees and costs the Haegers sought did not "result[] from Goodyear's allegedly sanctionable conduct." J.A. 68.

In response to the Haegers' application for attorney's fees and costs, Goodyear argued that the Haegers were entitled to recover only those fees and costs "resulting from Goodyear's allegedly sanctionable conduct," *id.*, and Goodyear further argued that some of the fees and costs for which the Haegers sought reimbursement were not causally linked to that misconduct. *Id.* at 59 (arguing that some of "the time entries submitted by plaintiffs . . . fall well outside the legitimate scope of . . . Goodyear's allegedly sanctionable conduct"). However, Goodyear asserted that only $722,406.52 of the fees and costs the Haegers requested are "unrelated to the alleged harm" caused by Goodyear's misconduct. ER 1393; J.A. 68-71. Importantly, Goodyear did not contend in the District Court that the other fees and costs the Haegers sought are not causally connected to Goodyear's misconduct.

Relying on Goodyear's argument, the District Court made an alternative "contingent award." Pet. App. 180a. The contingent award further reduced the amount of attorney's fees and costs awarded to the Haegers by the $722,406.52 to which Goodyear objected on causation grounds. The District Court intended that the contingent award would apply only if an appellate court overturned the larger amount awarded to the Haegers, thereby "prevent[ing] the need for future proceedings" even if the District Court was wrong on the causation issue. J.A. 107-08.

Goodyear dismisses the significance of the alternative contingent award on the ground that the lower courts never "adopted" it. Petitioner's Brief at 33. But a contingent award, by definition, does not get adopted unless the contingency occurs. Here, the alternative award was contingent upon an appellate court overturning the District Court's primary award of sanctions against Goodyear, which has not happened. But the point remains that if this Court were to conclude that the District Court should have accepted the only causation argument Goodyear made in the trial court – that $722,406.52 of the attorney's fees and costs were not causally linked to Goodyear's misconduct – then there is no reason to remand to the District Court to make a new determination because that court has already done so in the form of the contingent award.

By not raising the argument in the District Court, Goodyear has waived any argument that the attorney's fees and costs awarded to the Haegers, other than the $722,406.52 Goodyear challenged in the District

Court, are not causally linked to the sanctionable misconduct. This Court has long recognized that "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

Goodyear's decision not to challenge in the District Court most of the attorney's fees and costs awarded as sanctions on the basis of the causal-link requirement was not an inadvertent oversight. Goodyear expressly raised the causal-link requirement in the District Court, and specifically challenged $722,406.52 of the fees and costs the Haegers sought on that basis. But Goodyear knowingly chose not to challenge the remainder of the attorney's fees and costs the Haegers sought on that ground. Consequently, Goodyear has waived that argument with respect to the remainder, and should not be permitted to raise it for the first time on appeal:

> The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later – if the outcome is unfavorable – claiming that the course followed was reversible error.

Freytag v. C.I.R., 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment).

Accordingly, even if this Court were to determine that the lower courts applied the wrong causal-link standard, a remand to the District Court is not necessary. Instead, the Court may simply give effect to the alternative "contingent award" which the District Court adopted based on Goodyear's own admissions.

CONCLUSION

For all the reasons discussed above, the Court should affirm the Ninth Circuit's decision. If the Court determines that the District Court applied the incorrect causal-link standard, then the Court should give effect to the District Court's alternative "contingent award."

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 15-1406

IN THE
Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,

Petitioner,

v.

LEROY HAEGER, *ET. AL*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for Petitioner remains accurate.

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INTRODUCTION

Plaintiffs readily concede that courts must apply a causation requirement when sanctioning parties pursuant to their inherent authority. In fact, they go so far as to endorse "proximate causation," which this Court has defined as requiring "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Because neither the district court nor the Ninth Circuit majority adhered to such a causation requirement, Plaintiffs' concession is tantamount to a confession of error.

Seeking to avoid that fate, Plaintiffs insist that the district court and Ninth Circuit majority applied some type of causation standard. But those courts disavowed the causation test that courts commonly employ in sanctions and fees-related cases. Under that standard, when a court invokes its inherent authority, it must limit any monetary sanction to those fees and costs incurred only as a direct result of bad-faith conduct. The sanction may include incremental fees incurred solely because of the misconduct—but nothing more. And when misconduct is intertwined with the rest of the litigation, the sanction cannot include fees that would have been incurred anyway.

Purporting to apply *Chambers*, Plaintiffs offer a two-tiered approach where direct causation would govern sometimes, but not always. In the first tier, direct causation would be required for "discrete" misconduct; but in the second tier, courts would be freed from causation's restraint and allowed

unbridled discretion to fashion fee awards so long as they labeled the conduct "frequent," "egregious," or "pervasive." Invoking such vague phrases does not create a workable approach, and Plaintiffs' "standard" would provide no meaningful guidance to district courts or parties. The only certainty about their standard is that it will erode the vestiges of restraint around inherent authority and insulate any fee award from appellate scrutiny. This is inimical to due process and separation of powers principles.

The blanket fee award here does not satisfy causation. Accepting the district court's misconduct findings, it failed to apply the correct legal test to determine the appropriate fee award. Many issues in the litigation had nothing to do with any misconduct, taking this case far outside the boundaries of *Chambers*. This Court should accordingly reverse and remand for application of the direct causation standard.

ARGUMENT

I. This Court Should Enforce a Direct Causation Requirement for Inherent Authority Sanctions

A. The District Court And Ninth Circuit Refused To Apply Any Proper Causation Requirement

Plaintiffs attempt to forge a distinction between "causation" and "direct causation," but such efforts cannot obscure that, regardless of how they label what the Ninth Circuit and the district court did, both courts refused to apply a causation analysis.

Repackaging their brief in opposition to *certiorari*, Plaintiffs insist that the lower courts in this case applied a causation standard and paint this dispute as little more than factual squabbling. That was Plaintiffs' sole argument in resisting *certiorari* on this question. *See* Br. in Opp. 13. In accepting review of Goodyear's question presented, this Court presumably considered and rejected that argument as a basis for denying review. *See United States* v. *Williams*, 504 U.S. 36, 40 (1992) ("In granting certiorari, we necessarily considered and rejected that contention as a basis for denying review.").

Beyond the consequences of the Court's *certiorari* determination, Plaintiffs fail to reconcile their argument with the lower courts' analyses. The district court interpreted *Chambers* v. *NASCO, Inc.*, 501 U.S. 32 (1991) as "reject[ing] ... the position that only monetary harms incurred as a direct result of sanctionable conduct can be remedied." Pet. App. 157a. The court concluded that "*usually*" it must find a "direct causal link between the sanctionable conduct and the alleged harm." *Id.* But under its invented test, all fees may be awarded "when the sanctionable conduct rises to a truly egregious level." *Id.* Only "[i]n less egregious cases," must a court "tailor its award more carefully." *Id.* at 158a. Further proving the point, the district court proposed a "contingent" award to be applied if a "direct link[]" were required—a superfluous exercise if the court were applying causation. *Id.* at 180a.

The Ninth Circuit majority embraced the district court's analysis. *Id.* at 28a ("[U]nder *Chambers*, the district court did all it was required to do[.]"). It held that requiring "the specific amount of attorneys' fees

and costs awarded ... [to] be directly linked to the bad faith conduct ... *flouts controlling United States Supreme Court case law.*" *Id.* (emphasis added). Although the majority noted that "bad faith conduct caused significant harm," *id.* at 30a, it never evaluated *how much* harm was actually caused. Instead, it ruled that no direct linkage is required to shift all fees incurred once a party begins "engaging in frequent and severe abuses of the judicial system." *Id.* at 32a.

Plaintiffs thus go astray by claiming that the majority and dissent saw eye-to-eye "on whether a causal link was required." Resp. Br. 13. The majority's failure to require causation precipitated Judge Watford's dissent: "The majority does not contend that a causal connection between Goodyear's misconduct and the fees awarded has been shown here, as required for the sanctions to be deemed compensatory." Pet. App. 46a-47a. The lower courts simply made no effort to find any causal linkage between particular fees and specific misconduct.

B. The Direct Causation Standard Comports with Existing Sanctions Jurisprudence and the Policies Behind Inherent Powers

1. Plaintiffs acknowledge that causation, and even proximate causation, should apply to an inherent authority sanctions analysis. *See* Resp. Br. 30-31. Yet notwithstanding this concession, Plaintiffs resist a "direct-linkage" requirement, insisting that Goodyear "offers no definition of what it means by 'direct' in this context." *Id.* at 30, 32. Goodyear explained in its opening brief, however, that a direct causation standard does not allow the

impacted party to recover "*more* fees than it incurred in response to the misconduct." Pet. Br. 35. Goodyear also explained that this standard requires awards to be "tailored" in a "non-speculative way." *Id.* at 34, 36 (internal quotations omitted). This is not some type of "heightened" causation, but rather how courts normally apply causation in similar contexts. *Id.* at 27-32, 36 (describing causation standards from the discovery rules, Rule 11, and 18 U.S.C. §1927 and 42 U.S.C. §1988). Rather than grapple with these points, Plaintiffs largely disregard them.

Stated concisely: When a court acts under its inherent power, a monetary sanctions award should include only those fees and costs incurred as a direct result of bad-faith conduct. Under this test, the incremental fees and costs incurred solely because of the misconduct are recoverable. But fees and costs that would have been incurred in the absence of the misconduct are not. As further discussed below, this standard simplifies a court's initial sanctions award and subsequent appellate review by arming courts with a test that they already apply in similar circumstances. And this standard generates a compensatory award even where misconduct is intertwined with the rest of the litigation. *See Fox* v. *Vice*, 563 U.S. 826, 840-41 (2011).

Plaintiffs acknowledge that something like direct causation should apply often, but not always. *See* Resp. Br. 20. But eroding a causation requirement for certain sanctionable conduct does not remain faithful to *Int'l Union* v. *Bagwell*, 512 U.S. 821 (1994). Although Plaintiffs argue that *Bagwell* does not support direct-linkage, *Bagwell* recognizes that

courts must "calibrate" a civil sanction to actual damages "caused by" misconduct. 512 U.S. at 834. A looser standard than direct causation fails to "calibrate" an award to actual "'losses sustained.'" *Id.* (quoting *United States* v. *Mine Workers*, 330 U.S. 258, 303-04 (1947)). Such a standard also obscures the difference between what compensates for misconduct, and what strays into the punitive realm. *See id.* at 847 (Ginsburg, J., concurring in part and in the judgment).

Stripping away direct causation (at least some of the time) inevitably expands inherent authority beyond previously recognized limits. These limits aid courts in exercising their inherent powers with the necessary "restraint and discretion." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980). Direct causation offers a tangible check on the single judge "solely responsible for identifying, prosecuting, adjudicating, and sanctioning." *Bagwell*, 512 U.S. at 831. It also provides courts with a benchmark to ensure their sanctions are proportionate and tailored to misconduct. *See* Pet. Br. 12-15 (discussing *Degen* v. *United States*, 517 U.S. 820 (1996); *Dietz* v. *Bouldin*, 136 S. Ct. 1885 (2016); and related authority). And direct causation deters courts from resorting to inherent powers to evade the causation requirements of other sanctions. *See Chambers*, 501 U.S. at 50 (noting that "the court ordinarily should rely on the Rules rather than the inherent power" when the Rules might control).

Exemplifying these principles, the Eighth Circuit underscored causation's importance in the inherent authority context, rejecting a sanction that "[did] not compensate ... for fees incurred as a direct result of

Moll's conduct," "[did] not show the $50,000 sanction relates concretely to costs ... directly incurred because of Moll's actions," and was "not concretely tailored to compensate the court for actual costs resulting from the misconduct." *Baycol Steering Comm.* v. *Bayer Corp.*, 419 F.3d 794, 808-09 (8th Cir. 2005). Though Goodyear featured *Baycol*, Pet. Br. 34, Plaintiffs elect not to discuss this example of the direct causation test in practice.

2. Plaintiffs' argument that direct causation would prove unworkable for the lower courts is belied by both *Fox* and the myriad cases where courts have applied a similar standard to a sanctions award. Confronting "a mix of frivolous and non-frivolous claims," *Fox* invoked basic principles of direct causation:

> [A] defendant may recover the reasonable attorney's fees he expended *solely* because of the frivolous allegations. *And that is all....* [T]he defendant may not receive compensation for any fees that he would have paid in the absence of the frivolous claims.

Fox, 563 U.S. at 835, 840-41 (emphasis added). Balancing Section 1988's compensatory purpose with the American Rule, the Court recognized that "if the defendant would have incurred those fees anyway, to defend against *non*-frivolous claims, then a court has no basis for transferring the expense to the plaintiff." *Id.* at 832-36.

Plaintiffs refuse to address *Fox*'s causation test, quoting only its admonition that trial judges should not be rendered "green-eyeshade accountants." Resp. Br. 38-39 (quoting 563 U.S. at 838). But *Fox* did not

shy away from a meaningful causation test despite the reality that "litigation is messy." 563 U.S. at 834. Instead, the Court emphasized that only "*incremental harm* from the frivolous claim" is recoverable. *See id.* at 836 (emphasis added). By way of example, *Fox* explained that fees cannot be recovered for "a deposition on matters relevant to both a frivolous and a non-frivolous claim" if "the lawyer would have taken and committed the same time to this deposition even if the case had involved only the non-frivolous allegation." *Id.* But if a claimant "could prove" that particular litigation expenses were increased by the conduct, "then the court may reimburse the defendant for the increased marginal cost." *Id.* at 838. The burden falls on the fee applicant to untangle intertwined fees and costs. *See id.*

Deeming misconduct "interrelated" with the rest of the case, the district court in *Fox*, much like the district court here, "suggested that the close relationship between [frivolous and non-frivolous] claims supported Vice's request to recover *all* of his attorney's fees." *Id.* at 839-40. This Court disagreed: "That reasoning stands the appropriate analysis on its head." *Id.* Because only the costs of *frivolous* litigation may be shifted, recovery for fees and costs that "overlap between the frivolous and non-frivolous claims" is impermissible. *Id.* at 839-40. The Court therefore vacated an award of "full attorney's fees" for intertwined claims. *Id.* at 839, 841.

3. *Fox*'s guidance comports with various sanctions regimes, including Rule 11. *See* Pet. Br. 28-29, 34 (discussing *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990)). Indeed, Plaintiffs

appear to concede that the standard here should be informed by causation principles for other types of sanctions, including Rule 11. *See* Resp. Br. 31.

A few pages later, however, Plaintiffs reverse course and dismiss the Rule 11 analogy because "the purpose of Rule 11 sanctions is to deter." Resp. Br. 36. But "compensating the victim and deterring the perpetrator of Rule 11 violations are not mutually exclusive." *Rentz* v. *Dynasty Apparel Indus.*, 556 F.3d 389, 400 (6th Cir. 2009). On the contrary, Rule 11 recognizes that compensation of attorney's fees may sometimes be "warranted for effective deterrence," and authorizes an award of "part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4). Thus, when a court desires to compensate an affected party under Rule 11, a direct causation test is required.

Under Rule 11, this Court rejected an expansive interpretation of causation that would "extend indefinitely," and instead limited fee awards to that "directly caused" by the improper filing. *Cooter & Gell*, 496 U.S. at 406; *see* Fed. R. Civ. P. 11(c)(4) & advisory committee's 1993 note. The Seventh Circuit provided practical guidance in *Divane* v. *Krull Electric Company*, 200 F.3d 1020 (7th Cir. 1999). It overturned a "blanket award of attorneys' fees" for misconduct despite the district court's finding that the misconduct "'infected' the entire proceeding." *Id.* at 1030-31. In a "cautionary note," the Seventh Circuit explained that, under a direct causation standard, a fee award must be "limited to fees incurred as a direct result of the response and counterclaim filed by" the attorney. *Id.* at 1031. The

award "would naturally include any research conducted into the sole issue raised in [the improper] counterclaim." *Id.* But it "cannot include such activities as the cost of deposing witnesses ... who [plaintiffs] would have deposed without regard to the frivolous counterclaim...." *Id.* Such guidance illustrates how the test can be applied in practice, and largely tracks the *Fox* analysis.

Plaintiffs do not explain why a direct causation standard would breed "extensive and needless satellite litigation," *Chambers*, 501 U.S. at 51, in the inherent powers context but not under other sanctions and fee-shifting regimes. *See* Resp. Br. 37. Courts have long demonstrated their ability to review and assess fee applications for direct causation. *See* Pet. Br. 28-32. And if parties must tailor fee applications based on causation, then this will simplify the district court's reviewing task compared to the situation here where Plaintiffs submitted a stack of billing records and forced Goodyear and the court to unravel everything.

4. Perhaps inadvertently, Plaintiffs lend support to the direct causation standard. They concede that at least *proximate* causation should limit inherent powers sanctions but elide what that standard means. Resp. Br. 30-31 & n.7. In the very authority Plaintiffs offer, however, the Court defines proximate cause to require "some *direct* relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268 (emphasis added). Proximate cause excludes recovery for injuries that are "too remote," "purely contingent," or "indirect[]." *Id.* at 268-69, 271.

This articulation of causation, which requires "directness of relationship," *id.* at 269, stands far closer to the "direct causation" test than to Plaintiffs' alternative.[1] Plaintiffs also concede that something like direct causation applies in certain situations. *See* Resp. Br. 20. As explained below, their effort to create a two-tiered causation standard is neither workable nor consistent with the purposes of inherent powers.

C. Plaintiffs' "Standard" Would Impermissibly Expand the Inherent Authority

Plaintiffs struggle to define their suggested causation standard with any precision. At various times they indicate that causation would be satisfied if misconduct "affect[s] the entire litigation," Resp. Br. 20 (emphasis omitted); is "severe and pervasive," *id.* at 24; or if it renders the litigation a "sham," *id.* at 22. Such amorphous and imprecise descriptions suffer the same flaws as the "ad hoc ... standardless judicial lawmaking" rejected in the Section 1927 context by *Roadway Express*, 447 U.S. at 762 (refusing to adopt a "two-tier system of attorney sanctions"). These substitutes for causation do not assist courts in exercising their inherent powers "with restraint and discretion." *Id.* at 764. And they

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[1] Proximate causation, which developed in the tort context, does not apply neatly in the sanctions realm. Among other things, where much of the "injury" (*i.e.*, attorney's fees) would have been incurred regardless, "the [American] Rule provides that the prevailing party ordinarily cannot recover its own attorney's fees against the adverse party." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 271 (1975).

extend inherent authority sanctions well beyond any "narrowly defined circumstances." *Id.* at 765.

In short, Plaintiffs' standard "is in truth no standard at all." *Fox*, 563 U.S. at 835. They would replace *causation* with some loose *association* between fees and alleged misconduct. Like the "fairly attributable" standard rejected in *Fox*, Plaintiffs' formulation "would leave to each and every trial court not only the implementation, but also the invention, of the applicable legal standard." *Id.* at 835-36. More importantly, their standard offers no means of ensuring that fee awards imposed under inherent powers are compensatory and, therefore, compliant with due process.

1. "Affecting" litigation (a description Plaintiffs frequently invoke, *see* Resp. Br. 14, 20, 22) is not the same as "causing" litigation. A true compensatory award would grant only the "increased marginal cost[s]" that the sanctioned party caused the other side to incur, *Fox*, 563 U.S. at 838, rather than reimburse all fees related to the litigation. *See Cooter & Gell*, 496 U.S. at 406 (rejecting "overbroad" causation and limiting fee award to "those expenses directly caused by the filing").

Likewise, causation is not established by finding that misconduct "permeated" the litigation, as the district court indicated in its later fee award, Pet. App. 180a, or that it was "pervasive," in Plaintiffs' words, Resp. Br. 20, 22. When misconduct is "interrelated" with other conduct, only those fees "solely" caused by the misconduct are compensatory. *Fox*, 563 U.S. at 839-41. If a party "would have incurred the expense in any event," awarding that expense is not compensatory because the party "has

suffered no incremental harm." *Id.* at 836; *see also Divane*, 200 F.3d at 1030 (refusing to award all fees notwithstanding finding that the misconduct "infected" the entire proceeding); *Cooter & Gell*, 496 U.S. at 407 (rejecting award of anything that can "ultimately be traced" to misconduct).

Echoing the Ninth Circuit majority, Plaintiffs attempt to shoehorn this case into *Chambers* by describing the litigation as a "sham." Resp. Br. 15, 30-31; Pet. App. 30a. But they do not explain what "sham litigation" means or what suffices to prove it. Regardless, the district court never called the litigation a "sham"—it just indicated that misconduct made the case "far more complicated." Pet. App. 151a. Nor did the court deem the Heat Rise test conclusive either of a tire defect or the cause of Plaintiffs' accident. *Id.* at 52a n.1, 67a. As explained below, the fact that Goodyear had good faith defenses sets this case apart from *Chambers*. *See* Part D, *infra*.

Vague concepts like "frequency" and "severity" would create a similarly subjective standard that would encourage courts to take short-cuts. Plaintiffs would permit an award of all fees for any misconduct beyond "a single, discrete instance" or perhaps "a few instances." Resp. Br. 20. Such an ill-defined exit ramp from a meaningful causation standard would leave courts without adequate guidance and pave the way for abuse.

2. Plaintiffs also rely on the district court's statements that misconduct continued throughout the litigation, and that the case would have settled sooner. Resp. Br. 20. Similarly, the Ninth Circuit majority drew a temporal line in the sand,

substituting a *temporal* link for a *causal* one. It affirmed all fees incurred "once the Sanctionees began" their misconduct, or "during the time" when there was misconduct. Pet. App. 32a-33a, 37a. But a chronological sequence suffers from the *post hoc ergo propter hoc* fallacy. BLACK'S LAW DICTIONARY 1355 (10th ed. 2014) ("[A]fter this, therefore resulting from it[.]"). "It is called a fallacy because it makes an assumption based on the false inference that a temporal relationship proves a causal relationship." *McClain* v. *Metabolife Int'l, Inc.*, 401 F.3d 1233, 1243 (11th Cir. 2005).

The fallacy confirms the inherently speculative, and, therefore, arbitrary nature of the sanctions award. Such an award can hardly be called compensatory, nor consistent with due process. *See Holmes*, 503 U.S. at 268, 271 (excluding from proximate cause that which is "purely contingent"); *Topalian* v. *Ehrman*, 3 F.3d 931, 938 (5th Cir. 1993) (rejecting court's adoption of an "apparently arbitrary figure" for sanctions).

The district court's conclusion that the case "more likely than not would have settled much earlier" represents nothing but speculation. Resp. Br. 26; *see* Pet. App. 45a (Watford, J., dissenting) ("It's anyone's guess how the litigation would have proceeded if Goodyear had disclosed all responsive test results from the start."). Courts are ill-equipped to guess retrospectively when a case would have settled in light of the many collateral issues impacting settlement. *See Wong* v. *Luu*, 34 N.E.3d 35, 46-47 (Mass. 2015) ("[A] judge's inherent powers do not authorize the judge to determine who was responsible for the breakdown of negotiations, and

order the attorney responsible to pay the attorney's fees incurred by the other parties in the thwarted negotiations."). Settlement is a subjective (and not necessarily rational) choice made by the parties, which does not always hinge on the case's merits. Even if the court thinks settlement wise, "there is no legal duty to settle litigation.... If parties want to duke it out, that's their privilege." *Goss Graphics Sys., Inc.* v. *DEV Indus.*, 267 F.3d 624, 626, 628 (7th Cir. 2001).

In light of the historic restraints on inherent powers, and the requirement that courts exercise these powers narrowly, speculation about settlement is fundamentally an improper foundation for awarding compensatory fees. Regardless, the conclusion that Goodyear would have settled "earlier" finds no mooring in the record. Goodyear pointed to the examples of the *Schalmo* and *Woods* cases.[2] In response, Plaintiffs refuse to discuss *Woods* and insist that *Schalmo* is distinguishable. Resp. Br. 26-27. But this misses the point. These examples in the record where Goodyear produced the Heat Rise test did not trigger immediate settlements—the cases went to, or through, trial. Pet. Br. 7, 37. There is thus no record support for the notion that Goodyear would have immediately settled. Pet. App. 46a (Watford, J., dissenting) ("[T]he only relevant data point in the record supports the opposite conclusion."). And when challenged on this point, Plaintiffs offer the Court no citation to the contrary.

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[2] Goodyear also produced the test in two other cases, although the record of those examples is less developed. ER125.

3. Plaintiffs contend that a direct causation standard is unnecessary because of other "protection[s]," such as the bad faith requirement. Resp. Br. 39. But this requirement does not constrain the sanction's *amount*. *See* Pet. Br. 42-43. And its effectiveness as a check will be enhanced if courts are required to focus on specific misconduct, and its consequences, to satisfy direct causation. *See id.* Another of Plaintiffs' purported protections is the "right to object." *See* Resp. Br. 40. But the "right" to object to lack of causation is meaningless if, as Plaintiffs contend, courts are not actually required to comply with causation (and this case proves that point).

Plaintiffs also try to salvage the award by claiming that it was "intended to make the Haegers whole for losses incurred because of Goodyear's misconduct." *Id.* at 34. But the district court's subjective intent does not dictate whether the sanctions were compensatory or punitive. *See Bagwell*, 512 U.S. at 828 ("[C]onclusions about the civil or criminal nature of a contempt sanction are properly drawn, not from 'the subjective intent of ... laws and ... courts,' but 'from ... the character of the relief itself.'") (citation omitted). Moreover, the lower courts made clear they intended to award more than could be "directly linked" to misconduct. *See* Pet. App. 28a.

Finally, Plaintiffs try to distinguish examples of punitive inherent powers sanctions on the grounds that they were payable to the court. But this overlooks the broader point. To be compensatory, fees must be not only payable to harmed parties but *also* tailored to actual losses from misconduct. *See, e.g.*, *Bradley* v. *Am. Household, Inc.*, 378 F.3d 373,

378 (4th Cir. 2004) (vacating sanctions in part because "amounts of the fines were not determined by reference to any losses incurred ... as a result of" misconduct); *Crowe* v. *Smith*, 151 F.3d 217, 227 (5th Cir. 1998) (holding fines criminal because, in addition to being payable to the court, they were "flat" and without opportunity to purge).[3]

These "protections" do not adequately restrain district court discretion in the exercise of powers that are "uniquely ... 'liable to abuse.'" *Bagwell*, 512 U.S. at 831. Direct causation, by contrast, ensures that inherent powers sanctions are appropriately tailored by affording an appropriate ceiling. *See Spallone* v. *United States*, 493 U.S. 265, 280 (1990) (obligating courts to sanction under "the least possible power adequate to the end proposed") (internal quotations omitted). Particularly under abuse-of-discretion review, a uniform causation standard is needed to protect parties from unfairly punitive awards, consistent with due process.

Without it, courts have incentives to resort to inherent authority to impose more severe sanctions than other regimes allow, even when other statutes or Rules are "up to the task." *Chambers*, 501 U.S. at 50. Litigants of all stripes are harmed by the use of inherent authority to sidestep procedural requirements in the Rules. *See* Danielle K. Hart, *Happy (?) Birthday Rule 11: And The Chill Goes On—Federal Civil Rights Plaintiffs Beware*, 37 LOY.

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[3] Plaintiffs characterize various circuit cases as "not support[ing] [Goodyear's] direct-linkage argument," Resp. Br. 34. While Goodyear cited these cases for another purpose—to show that *Bagwell* applies to non-contempt sanctions, Pet. Br. 21-22—they also affirm the role of causation.

L.A. L. REV. 645, 647, 675-76 (2004) (explaining that civil rights plaintiffs are most likely to be chilled by resort to inherent powers). By recognizing a direct causation standard, this Court can impose meaningful restraints consistent with the historical treatment of inherent powers.

D. Reversal Is Required Under Any Causation Standard

Viewed through the correct legal lens, the sanction in this case fails to satisfy causation. Plaintiffs' clear error arguments, Resp. Br. 20-22, miss the mark because application of the wrong legal standard necessarily constitutes an abuse of discretion. *Cooter & Gell*, 496 U.S. at 405 ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law...."). From the outset, Goodyear has challenged the district court's rejection of a direct causation test, which tainted the court's consideration of the record evidence and now necessitates reversal. *See Maynard* v. *Nygren*, 332 F.3d 462, 467 (7th Cir. 2003) ("[W]hile factual findings are generally reviewed only for clear error, findings which are tainted by the application of an inapposite standard are subject to fuller review.").

1. Beyond the points above, the district court erred by invoking *Chambers* to avoid causation. *Chambers* does not carve an exception to causation for "egregious" misconduct, as the district court surmised. Pet. App. 157a-158a. *Chambers* held that an award of all fees satisfied causation when the "*entire course of conduct throughout the lawsuit* evidenced bad faith and an attempt to perpetrate a fraud on the court." 501 U.S. at 50 (emphasis added). The sanctioned defendant "never had a

good-faith basis" to defend the case, resulting in an unnecessary lawsuit prolonged by frivolous defenses. Pet. App. 48a (Watford, J., dissenting, discussing *Chambers*).

This case bears no resemblance to *Chambers*. Although the district court characterized the misconduct as frequent and severe, its actual findings show the following instances during the underlying litigation: (1) counsel's failure to produce certain tests in a timely manner, Pet. App. 88a-96a; (2) the failure to produce the Heat Rise test at all, *id.* at 75a-76a; (3) statements to the court by local counsel about the status of document production, *id.* at 97a-101a; and (4) testimony by the corporate representative regarding the existence of test records, *id.* at 107a-110a.[4] These findings do not support (and the court never found) that Goodyear's "entire course of conduct" was in bad faith, nor that it lacked a good-faith basis to defend the case.

None of this is to belittle the seriousness of these matters, but rather to illustrate their focus on one aspect of the litigation. The Heat Rise test may have implicated Plaintiffs' design defect claim against Goodyear—but even then, the district court made no finding that it was dispositive on that issue (nor could it have, in light of the testimony by Goodyear's engineers that Plaintiffs did not rebut, *see, e.g.*, ER559-60). If the test had been produced, Goodyear still would have been able to contest the design defect claim in good faith.

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[4] The remaining instances of alleged misconduct occurred after the litigation's conclusion.

But setting that aside, Goodyear had good faith defenses to liability that were wholly independent of the design defect issue. For instance, the issue of what caused the accident was hotly disputed (even assuming a defective tire), and the district court admitted, "[t]he cause of the accident was never determined." Pet. App. 52a n.1. Goodyear could have presented evidence at trial that the tire was already damaged from a prior impact, that driver error caused the accident, and that a failure to wear seat-belts contributed to the injuries. Dkt. 838,[5] at 4-5; Dkt. 842, at 4. The parties also debated how underinflation and overloading affected liability. Dkt. 838; Dkt. 807.

Thus, it is undisputed that Goodyear, unlike the party in *Chambers*, had good faith defenses that it could have presented at trial. Goodyear provided similar examples from other sanctions contexts to show that a blanket sanctions of "all" fees does not comply with causation. Pet. Br. 29, 35. While Plaintiffs claim some of this authority supports their position, Resp. Br. 35, these cases reject sanctions of all fees unless "*every* facet of th[e] litigation was patently meritless." *Browning* v. *Kramer*, 931 F.2d 340, 345 (5th Cir. 1991) (Section 1927 sanctions); *see Maynard*, 332 F.3d at 471 (same, for Rule 37 sanctions). Here, Goodyear's good-faith defenses confirm that much of the litigation would have occurred regardless of any misconduct.

2. As discussed above, under a direct causation standard, only those fees directly caused by

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[5] "Dkt." references the district court's docket entries. A few of the filings cited herein are sealed, but we avoid discussing any confidential information from those filings.

misconduct should be recoverable. *See Cooter & Gell*, 496 U.S. at 406. Where misconduct is "interrelated" with the rest of the litigation, the award should be limited to those fees incurred "solely because of" the misconduct. *See Fox*, 563 U.S. at 839-41. But the district court never required Plaintiffs to show causation, instead permitting an award of nearly all fees based on a three-page application. J.A. 54-56.

The docket and time entries (Dkt. 1100-1, 1100-2) confirm that the vast majority of the litigation would have occurred even without any misconduct. Examples of such matters include: (1) The depositions of parties, experts, first responders, and other witnesses. *See, e.g.*, Dkt. 110-15, 154-60, 167-170, 178-89, 193-98, 202-07, 227-231, 281-90, 521-26. (2) The summary judgment briefing on Plaintiffs' theories of manufacturing defect, failure to warn, and failure to recall. *See* Dkt. 651 at 24-26; Dkt. 864, Tr. at 29:8-17. (3) The briefing regarding Goodyear's *Daubert* challenges to Plaintiffs' experts. *See* Dkt. 651. (4) The briefing on more than twenty motions in *limine*. *See, e.g.*, Dkt. 679-701, 703-19, 730-31, 733-45, 747-56, 758-78. (5) A host of other motions, such as disputes over choice of law, Dkt. 453-56, 459-62, and motions to strike, Dkt. 408, 425, 463, 724. (6) Plaintiffs' efforts to establish their own medical damages. *See* Dkt. 866-67; *Divane*, 200 F.3d at 1031 (sanction "cannot include such activities as the cost of deposing witnesses" who would have been deposed anyway).

Apart from all of this, Plaintiffs pursued two other defendants separate from Goodyear—Spartan Motors and Gulf Stream Coach. ER778. Spartan built a chassis using tires purchased from Goodyear, and Gulf Stream then built the motor home on top of

the chassis. J.A. 37. Needless to say, the failure to produce the Heat Rise test could not have impacted Plaintiffs' independent claims against these other defendants premised on theories other than a defective tire.

To be sure, the litigation was contentious and "messy." *Fox*, 563 U.S. at 834. But it is by no means "impossible," Pet. App. 170a, to draw the necessary causal connection between the misconduct and certain fees. Nor is it of any moment if the appropriate fee award does not rise to the level sufficient to punish Goodyear (in the district court's eyes) because non-compensatory punishment is the domain of criminal contempt.

To the extent that any other remedies are appropriate, that is the province of tort law, not inherent authority sanctions. Plaintiffs are currently pursuing fraud-based and abuse-of-process claims, while seeking a substantial recovery including punitive damages. Their state court complaint in *Estate of Haeger* v. *Goodyear Tire & Rubber Co.*, No. 2013-052753, Compl. at 77-79, 81 (Maricopa Co., Ariz., Sup. Ct.), requests both fee shifting under state law *and* the "fees and costs" as damages "incurred as a result of the wrongful acts and omissions of Defendants." Based on their expert report and discovery responses, Plaintiffs apparently seek an aggregate recovery in excess of $100 million in that litigation (which Goodyear is vigorously defending).

E. The "Contingent" Award Cannot Avert a Remand

Plaintiffs seek to forestall a remand by pointing to the district court's "contingent" award. Resp. Br. 41-

44; Pet. App. 180a, 185a. If this Court agrees with Goodyear, however, then the district court will need to consider what fees were directly caused by the misconduct at issue since it never attempted to undertake that task. The contingent reduction of $722,406.52 reflects only fees related to other defendants and medical damages, and thus it captures a subset of the improperly-awarded fees. ER1352-54.

Nor can Plaintiffs avoid a remand by arguing that Goodyear waived its causation argument regarding the contingent award. Before the district court imposed sanctions, Goodyear raised the exact causation argument that it advances here. ER1077-79. In the face of Plaintiffs' request for all fees, Goodyear cited *Chambers* and other related authority to argue that sanctions should "compensate for the loss caused by the sanctioned conduct." ER1077. Goodyear further explained that courts must show a "connection between the amount of monetary sanctions" and the "sanctionable conduct." ER1078 (citation omitted).

As it imposed sanctions, the district court rejected Goodyear's arguments, awarding all attorney's fees, as described above. Pet. App. 152a. The court also deemed Ninth Circuit authority recognizing a direct causation requirement as inconsistent with this Court's precedent. *Id.* at 156a-158a (discussing *Miller* v. *City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011)).

In the wake of the district court's ruling, Goodyear specifically preserved these arguments when it opposed Plaintiffs' fee request, J.A. 58 n.1, 68-69, citing *Miller*'s causation requirement. This was everything necessary to preserve the issue.

Goodyear then proceeded to make a fallback argument, highlighting certain categories of fees that had nothing to do with Goodyear. J.A. 69-71. The contingent reduction of $722,406.52 represents a *subset* of the fees that bear no relation to sanctionable misconduct, but does not comprise the entire universe. The Ninth Circuit certainly never suggested that Goodyear waived this argument. *Compare* Goodyear Ninth Cir. Br. in Case No. 13-16801, at 16-31 (Dec. 16, 2013), *with* Pet. App. 26a-39a. A remand will accordingly be necessary for the district court to apply the correct causation test.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court reverse the Ninth Circuit, vacate the award of attorney's fees, and remand with instructions to apply a direct causation standard as set forth in this Court's opinion.

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Dated: January 3, 2017

AND
BRIEFS

21

No. 15-1406

In the Supreme Court of the United States

THE GOODYEAR TIRE & RUBBER COMPANY,
PETITIONERS,

v.

LEROY HAEGER, DONNA HAEGER, BARRY HAEGER, AND SUZANNE HAEGER,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION *AS AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is a federal court required to tailor compensatory civil sanctions imposed under inherent powers to harm directly caused by sanctionable misconduct when the court does not afford sanctioned parties the protections of criminal due process?

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INTEREST OF THE *AMICUS CURIAE*[1]

Since its founding in 1878, the American Bar Association ("ABA") has played a formative role in the development of the profession of law in the United States. Integral to that work has been the promotion of legal ethics, along with guidelines for punishing lawyer misconduct. These considerations are embodied in multiple ABA publications, such as the ABA's MODEL RULES OF PROFESSIONAL CONDUCT; CIVIL DISCOVERY STANDARDS; STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE; and the STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE. The ABA also works to protect the due process rights guaranteed by the Constitution.

The ABA fully supports the proposition that federal courts must have adequate power to sanction parties and attorneys for misconduct in the litigation of a case, whether through Rule 11, the discovery rules, or (where necessary and appropriate) the exercise of the court's inherent power.[2] Indeed, the ABA has adopted a strong stance on sanctions for discovery abuse: "'When a party fails to comply with

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE ("SPECIAL FUNCTIONS OF THE TRIAL JUDGE"), Standard 6-4.1.

its disclosure obligations the court has a *duty* to impose appropriate sanctions.'"[3]

Inherent sanctioning power should be exercised with caution and restraint, however. A court ordinarily should not resort to inherent power to punish discovery abuse if the conduct and the appropriate sanction are explicitly addressed by the Federal Rules of Civil Procedure. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991). And where, as here, the relevant rule and the inherent power share the same goals, courts should strive for consistency when imposing sanctions regardless of which sanctioning power they are relying on. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980) (discussing the need for consistency in attorney-fee sanctions).

To promote uniformity in sanctions practice, the ABA has adopted the various standards and guidelines listed above.[4] These standards echo the due process requirement that, before sanctions are imposed, the alleged offender must be afforded fair notice and an opportunity to be heard.[5] And, regarding the types of sanctions to consider, the ABA standards advise that a court may award reasonable

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[3] ABA CIVIL DISCOVERY STANDARDS, Standard I.3, cmt. (emphasis added) (noting that this position, adopted by the ABA in 1988, is consistent with state and federal discovery rules).

[4] *See, e.g.*, STANDARDS AND GUIDELINES FOR PRACTICE UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE ("STANDARDS FOR RULE 11 PRACTICE"), American Bar Association, 121 F.R.D. 101, 104 (1988).

[5] *Id.* at 127.

attorney's fees incurred as a result of the misconduct,[6] but should select the least severe sanction adequate to serve the goal of that punishment.[7]

For example, Rule 37(c) and inherent power have common goals which authorize compensatory attorney-fee sanctions to punish discovery abuses that do not violate a court order. *See* Fed. R. Civ. P. 37(c)(1)(A); *Chambers*, 501 U.S. at 46. Under both the rule and inherent power, though the sanction serves to punish the transgressor, the punishment is limited by a remedial measure. *See id.* Thus, under the ABA standards, a court can impose an attorney-fee sanction to punish discovery abuse, but the amount of that sanction should not exceed the extra fees caused by the misconduct.

When considering what weight to give the ABA standards, the Court should note that the ABA is the leading and the largest bar association in the United States. Its more than 400,000 members are diverse, coming from all fifty states and other jurisdictions. They include attorneys in large and small law firms, corporations, non-profit organizations, government agencies, prosecutors, public defenders, private plaintiff's and defense counsel, judges, legislators, law professors, law students, and non-lawyer associates in related fields, among others. Moreover, the ABA standards on lawyer-sanctions were developed after

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[6] *Id.* at 124; *see also* CIVIL DISCOVERY STANDARDS, Standard I.3, cmt. ("Sanctions might include ... requiring a party or counsel to pay the other side's counsel fees and expenses caused by the default or failure.").

[7] STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 124; *see also* SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2 ("the judge should ordinarily impose the least severe sanction appropriate").

years of study and discussion by leading members of this diverse organization.[8]

As the ABA standards reflect, the ABA does not condone any discovery abuse.[9] On the other hand, even bad faith misconduct does not permit a court to deviate from the established standards that govern attorney-fee sanctions – or the heightened procedural protections that are necessary when a court imposes a fine that goes beyond the amount of the extra expenses caused by the misconduct. As Justice Kennedy stated when dissenting in *Chambers*, "our outrage at [t]his conduct should not obscure the boundaries of settled legal categories." *Chambers*, 501 U.S. at 60-61 (Kennedy, J., dissenting).

The ABA submits, therefore, that the judgment of the Ninth Circuit should be reversed because it upheld an attorney-fee sanction that was significantly higher than the fees traceable to the discovery violations – and did so without observing required procedural protections.

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[8] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[9] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.3.

SUMMARY OF ARGUMENT

The question presented should be answered in the affirmative. In particular, an attorney-fee sanction under inherent power – like the one imposed in this case – must be limited to the expenses caused by the misconduct unless heightened procedural protections have been observed.

The ABA's position is based on standards that it developed after years of studying sanctions law, including this Court's decisions on the federal courts' inherent power to punish litigation misconduct. These standards reflect several governing principles.

First, the American Rule bars fee-shifting with only three narrowly defined exceptions when a court is acting under inherent power. One of the exceptions permits the use of an attorney-fee sanction to punish bad faith conduct falling short of contempt-of-court, but only if the award is remedial. This exception shares a common goal with the Federal Rules of Civil Procedure, which also authorize compensatory attorney-fee sanctions for non-contumacious litigation misconduct. Thus, both sources of sanctioning power allow a court to punish misconduct through fee-shifting, but the *measure* of this punishment is the amount of fees caused by the violation. Notably, this sanction is less drastic than the sanctions available for contempt, which may include a noncompensatory fine equal to the entire cost of the litigation if criminal due process is applied.

Second, due process demands proportionality in the assessment of fees under inherent power to guard against arbitrary punishment, which is a risk when a court functions as accuser, prosecutor, and sentencer.

The ABA standards embrace this concept by instructing trial judges to select the "least severe sanction" needed to serve the purpose at hand. Accordingly, when punishment is meant to be remedial in nature, the court should avoid an attorney-fee sanction that is over-inclusive, awarding fees that go beyond those caused by the violation. Furthermore, the notice aspect of due process requires a court to distinguish between a remedial attorney-fee award and a larger non-compensatory fine because, if a party is facing the latter, it must be told this in advance so that it can avail itself of the higher procedural protections that apply in that circumstance.

As this Court has held, the heightened procedural protections required of criminal proceedings must be observed if a court wants to rely on inherent power to impose a significant non-remedial fine – like the attorney-fee sanction in this case, which even the district court acknowledged was vastly greater than the fees that were traceable to the misconduct.

Finally, the ABA recognizes that it may be hard to tell what expenses were directly caused by the misconduct. Such difficulty cannot, however, enlarge inherent powers or eliminate procedural protections. Instead a court should consider how causation issues are resolved in other fee contexts (such as "prevailing party" awards under fee-shifting statutes) and exercise its discretion accordingly.

In this case, however, the Ninth Circuit held that no such effort is required. That was error. Accordingly, the judgment below should be reversed.

ARGUMENT

AN ATTORNEY-FEE SANCTION UNDER INHERENT POWER MUST BE LIMITED TO THE EXPENSES CAUSED BY THE MISCONDUCT UNLESS HEIGHTENED DUE PROCESS PROTECTIONS HAVE BEEN OBSERVED.

A. Under traditional sanctions law, only those attorney's fees caused by the misconduct may be awarded absent contumacious conduct.

The ABA's standards address various sources of authority for sanctioning misconduct in litigation, such as Rule 11, the discovery rules, 28 U.S.C. § 1927, and inherent authority. *See* STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 104. None of the ABA standards, however, considers the possibility of an attorney-fee sanction that is higher than the amount necessary to compensate the other side for the expenses caused by the violation. The ABA standards consistently state that an attorney-fee sanction should be limited to the amount necessary to remedy the misconduct.

Under the ABA standards, for example, a court can punish discovery abuse by making a party or counsel "pay the other side's counsel fees and expenses *caused by the default or failure.*" CIVIL DISCOVERY STANDARDS, § I.3, cmt. (emphasis added). Similarly, the ABA standards on Rule 11 practice state that a court may award "reasonable expenses, including reasonable attorneys' fees, *incurred as a result of the misconduct.*" STANDARDS FOR RULE 11

PRACTICE, Part L, § 2, 121 F.R.D. at 124 (emphasis added).[10]

This causation element, which runs throughout the ABA standards, comports with this Court's explanation of the "American Rule." *See Chambers*, 501 U.S. at 46.

The American Rule prohibits fee shifting in most cases. *Id.* at 45 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975)). Indeed, there are just three "narrowly defined" exceptions to the American Rule when a court is acting under inherent power: (1) a "common fund" award; (2) sanctions for the willful disobedience of a court order; and (3) attorney's fees imposed when a party has acted in bad faith. *Id.* Only the third exception applies here, as the record shows no common fund or finding that a court-order was violated.

The third exception serves the dual purposes of punishment and remediation. *Id.* at 46. Thus, while a court has inherent power to punish bad faith with an attorney-fee sanction, the measure of this punishment is the amount necessary to make the injured party "whole" by giving him the "expenses caused by his opponent's obstinacy." *Id.* (quoting

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[10] Although these standards refer to sanctioning authority under the Federal Rules of Civil Procedure, they provide valuable guidance for sanctions under inherent power as well. *see , e.g., TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 921 (Tex. 1991) (Gonzalez, J., concurring) (stating that the ABA's *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* should be considered whenever sanctions are at issue).

Hutto v. Finney, 437 U.S. 678, 689 n.14 (1979)). The punishment – the attorney's fees – must also serve the remedial purpose, which limits the sanction to the extra fees incurred as a result of the misconduct.

Significantly, *Chambers* distinguished the attorney-fee sanction authorized by the third exception, which applies here, from sanctions that are available under the second exception, which deals with contempt of court. *Chambers*, 501 U.S. at 45-46. Under the second exception, "a court's discretion to determine '[t]he degree of punishment for contempt' permits the court to impose as part of the fine attorney's fees representing the entire cost of the litigation." *Id.* at 45. Furthermore, the Court characterized that "fine" as "more drastic" than the remedial attorney-fee sanction for bad faith conduct that does not violate a court order:

> The imposition of sanctions [under the third exception] ... serv[es] the dual purpose of "vidicat[ing] judicial authority *without resort to the more drastic sanctions available for contempt of court* and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy."

Id. (emphasis added).

In *Chambers*, the Court approved an attorney-fee sanction that "represented the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. *Chambers*, however, involved contumacious conduct. *Id.* at 57. "[Th]ere, for example, Chambers' attempt to gain the FCC's permission to build a new

transmission tower was in direct contravention of the District Court's orders to maintain the status quo pending the outcome of the litigation and was therefore within the scope of the District Court's sanctioning power." *Id.*

"Thus, a court's discretion to determine '[t]he degree of punishment for contempt' permit[ted] the court to impose as part of the fine attorney's fees representing the entire cost of the litigation." *Id.* at 45. But where, as here, the court is not punishing for contempt, inherent power to impose an attorney-fee sanction is restricted to those expenses directly caused by the misconduct. *See id.* at 46; *Kerrin v. U.S. Postal Service*, 218 F.3d 185, 190 (2d Cir. 2000) (noting remedial goal of attorney-fee sanction under inherent power).

There is another reason why *Chambers* sets no precedent for the non-remedial fine in this case – the sanction there was compensatory. *See Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1256-57 (2016) (Watford, J., dissenting). The sanction awarded fees for the entire case, but it was calibrated to the harm because the misconduct occurred throughout the entire case, from start to finish. *Id.* The award, therefore, was authorized under both the second and the third exceptions to the American Rule.

In sum, under traditional sanctions law as set out by *Chambers* and the ABA standards, a court's inherent power to use an attorney-fee award to punish non-contumacious conduct is limited to making the transgressor pay for those expenses incurred as a result of the misconduct.

B. The proportionality and notice aspects of due process require that compensatory sanctions be linked to the misconduct.

When relying on inherent power to impose an attorney-fee sanction for bad faith conduct, a court must observe due process "both in determining that the requisite bad faith exists and in assessing fees." *Chambers*, 501 U.S. at 50.

Due process demands proportionality in the assessment of fees to guard against arbitrary punishment, which is a risk when a court functions as accuser, prosecutor, and sentencer. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994).[11] And arbitrary results should be avoided whether the sanctions are criminal or civil. *See id*; *see also Roadway Express, Inc.*, 447 U.S. at 763 (discussing the need for consistency in attorney-fee sanctions).

The ABA's standards on the "Special Functions of the Trial Judge," therefore, instruct that a judge should select the "least severe sanction" needed to serve the purpose at hand:

> **If the judge determines to impose sanctions for misconduct affecting the trial, the judge should ordinarily impose the least severe sanction appropriate to correct the abuse and deter repetition. . .**

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[11] *Cf. Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 499 (2008) (finding that inherent authority to impose sanctions for litigation misconduct is curbed by notions of proportionality required by the Eighth Amendment).

SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2 (emphasis original); *see also* STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 124 (instructing courts to impose the "least severe sanction").

ABA commentary also explains that "[a]n unnecessarily severe sanction may be self-defeating, as may any appearance of passion or pettiness, because it will bring 'discredit to a court as certainly as the conduct it penalizes.'" SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2, cmt.

The judgment in this case contravenes these principles by imposing an attorney-fee sanction that is not tailored to the expenses caused by the discovery violations. Indeed, the district court found that – if a direct connection is required – the sanction should be reduced by over $700,000. Order (8/26/2013) (Doc. 1125) at 7. A fine that so greatly exceeds the compensatory purpose of the third exception to the American Rule runs afoul of due process because it lacks proportionality.

Due process also has a notice requirement. Notice must be given of the type of sanctions a party is facing in addition to notice of what conduct is being challenged.

> The party sought to be sanctioned is entitled to particularized notice including, at a minimum, 1) the fact that Rule 11 sanctions are under consideration, 2) the reasons why sanctions are under consideration, and 3) the form of sanctions under consideration. Id. Only

> with this information can a party respond to the court's concerns in an intelligent manner.

Simmerman v. Corino, 27 F.3d 58, 64 (1994); *see also* STANDARDS FOR RULE 11 PRACTICE, 121 F.R.D. at 127 ("Sanctions may not be imposed upon a person who is not on notice of . . . *the type of sanctions* under consideration." (emphasis added).

In this case, there is disagreement over what type of sanctions were imposed. The majority opinion says that the sanctions were compensatory even though they were significantly greater than the amount that the district court said it would award if the sanction must be limited to the extra fees traceable to the misconduct. The dissent, however, argues that the attorney-fee award was a noncompensatory punitive sanction. This difference is material because – even though both involve an attorney-fee award – heightened procedural protections apply to the second type of sanctions. *See Bagwell*, 512 U.S. at 834; *see also infra* at Section C. Due process requires courts to recognize the difference between these types of sanctions – a remedial attorney-fee award versus a larger noncompensatory fine – because, if a party is subject to the latter, it must be told this in advance so that it can avail itself of the higher procedural protections that apply in that circumstance.

C. If a court exercises inherent power to punish non-contumacious bad faith conduct with an attorney-fee sanction that exceeds the expenses caused by the misconduct, heightened procedural protections must be observed.

Judge Watford's dissent argued that, "[i]f the sanctions that can properly be deemed compensatory seem too paltry under the circumstances, the district court could still fashion an award of punitive sanctions, so long as it applies the corresponding heightened procedural protections." *Haeger*, 813 F.3d at 1258 (Watford, J., dissenting). The ABA, however, does not concede that, absent contumacious conduct, a court has inherent authority to punish discovery abuse with a substantial non-compensatory attorney-fee fine under any circumstances.[12] But, if inherent power does permit a non-contempt attorney-fee sanction greater than the expenses traceable to the discovery abuse, the ABA agrees that such a sanction would require heightened procedural protections.

Bagwell discussed the means other than contempt that can be used to remedy misbehavior by litigants and their lawyers – such as striking pleadings,

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[12] Again, *Chambers* recognized that, when faced with contumacious conduct, a court has inherent power to "impose as part of the fine attorney's fees representing the entire cost of the litigation." *Chambers*, 501 U.S. at 45. But it contrasted that type of sanction with the less drastic sanctions available under the third exception to the American Rule, which governs here. Further, *Chambers* explained that, under the third exception, inherent power may be used to punish bad faith conduct with a *compensatory* attorney-fee award.

assessing costs, excluding evidence and entering a default judgment. *Bagwell*, 512 U.S. at 833. It observed that, like coercive civil fines, those sanctions have never been considered criminal and thus have not warranted criminal due process. *Id.* *Bagwell*, however, contrasted those civil sanctions with fines that are "noncompensatory" in character. *Id.* at 834.

Bagwell stressed that the district court had made no attempt to calibrate such serious fines to damages caused by the misconduct "or indicate that the fines were 'to compensate the complainant for losses sustained.'" *Id.* (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947)). The fines, therefore, were "more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed." *Id.* at 837. Accordingly, the Court held that the heightened procedural protections required of criminal proceedings must be observed before such fines could be imposed. *Id.* at 837-38; *cf. id.* at 839 (excluding "petty" noncompensatory fines from the heightened procedural requirements). *Bagwell*, therefore, advanced the teaching of *Chambers* by making clear that, if monetary sanctions under inherent power stray from the causal-compensatory measure, they must be accompanied by heightened procedural protections.

Like the fines in *Bagwell*, a significant attorney-fee sanction that is not calibrated to the damage caused by the misconduct is closer to a criminal fine than the traditional civil means of controlling judicial proceedings. Thus, the hefty noncompensatory award in this case also requires heightened procedural

protections. *See id.* at 837-38; *see also FTC v. Trudeau*, 579 F.3d 754, 770 (7th Cir. 2009) ("If any part of [the attorney-fee sanction] winds up being punitive instead of remedial, then criminal proceedings are required to sustain it.").

Simply put, "[w]here, as here, 'a serious contempt [or analogous fine] is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.'" *Bagwell*, 512 U.S. at 839 (quoting *Bloom v. Illinois*, 391 U.S. 194, 209 (1968)).

Finally, the ABA understands that courts may face a challenge when trying to identify the expenses directly caused by a failure to disclose in discovery. Such difficulty, however, cannot enlarge inherent powers or eliminate procedural protections. Instead, a district court should consider how courts resolve causation issues in other fee contexts – keeping in mind the black letter principle that "the judge should ordinarily impose the least severe sanction appropriate to correct the abuse." SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-4.2.

For example, a similar problem was addressed in a "prevailing party" case, *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). *Hensley* found that, if there was only partial success, total hours times a reasonable rate might yield an excessive award. *Id.* A district court, therefore, must make an effort to trim the non-compensable hours. *Id.* There is no precise formula for this task, but a court has options. *Id.* It "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the

limited success. *Id.* at 436-37. The court's discretion is always bounded, however, by its authority to shift fees. *Id.* at 437; *see also Trudeau*, 579 F.3d at 770.

Yet, in this case, the Ninth Circuit held that no such effort is required – even though the sanction was patently over-inclusive, awarding far more than the expenses that were directly caused by the misconduct. Because this excessive fee-shifting is more analogous to a criminal fine than traditional civil sanctions, it was error to impose it without observing the heightened procedural protections required of criminal proceedings.

CONCLUSION

For the reasons set forth herein, the American Bar Association requests that the judgment of the Ninth Circuit be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

LEROY HAEGER, ET. AL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

NAM is concerned that failure to require a direct causal link between a litigant's alleged discovery violations and compensatory damages to other parties can lead to abusive sanctions, particularly for manufacturers. Developing products can generate huge sums of data and make discovery a complex undertaking fraught with potential mistake and gamesmanship. Requiring compensatory damages to be anchored by causation can help assure that discovery sanctions will not undermine the search for truth and a court's ability to facilitate justice.

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[1] Pursuant to Rule 37.6, counsel for NAM certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than the NAM, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. The Parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Chambers v. NASCO, Inc.*, the Court sought to achieve a delicate balance for how courts sanction serious discovery misconduct. *See* 501 U.S. 32 (1991). The Court provided judges with the inherent authority to "assess attorney's fees when a party has acted in bad faith" during discovery, but told courts to "exercise caution in invoking [this] inherent power . . . both in determining that the requisite bad faith exists and in assessing fees." *Id.* at 45, 50. The sole issue in this appeal is clarifying the limitations that exist on the amount of fees assessed. In *Chambers*, the Court ruled that all fee shifting sanctions "must comply with the mandates of due process" and be limited to compensating the affected party for the consequences of the disobedience. *Id.* at 50, 54. The Court can now make clear that a causal connection between the discovery misconduct and the fees assessed is fundamental to both of these limitations.

In the instant case, the District Court abrogated its responsibility to tie the fee-shifting sanction to only those fees caused by the alleged malfeasance. In fining Defendant $2.7 million, it awarded *all* of the Plaintiff's attorneys' fees and costs that were incurred *after* the alleged discovery violation. The court acknowledged it did not "draw the precise causal connections between the misconduct and the fees Plaintiffs incurred." Pet. App. 180a. It also did not "determine how the litigation would have proceeded if Goodyear had made the proper disclosures." *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1242 (9th Cir. 2016). In affirming the award amount, the Court of Appeals for the Ninth Circuit

accepted this *post hoc ergo propter hoc* fallacy of whatever happens *after* an event can be attributed to the event. *See id.* at 1252. As a result, Defendant is undoubtedly overcompensating Plaintiff for more than the fees and costs caused by its noncompliance.

As this brief shows, this Court has been clear that overcompensating a litigant for its economic compensatory damages is unlawful. This is true whether compensatory damages are ordered for sanctions or substantive liability. For sanctions, any amount paid to another party for attorney fees and costs not caused by one's alleged misconduct is punitive and, therefore, criminal in nature. The District Court could have punished Defendant beyond that which was needed to make Plaintiffs whole for their losses, but it would have had to identify this amount and engage in a separate, criminal process to levy those sanctions. The lack of necessary findings and corresponding overcompensation violate Defendant's due process protections. The fine ought not be upheld.

Failure to require this causal connection also creates the opportunity for a court to arrive at a sanction amount unmoored by a limiting principle. Judges seeking to impose harsher penalties than allowed under statutory or Rule-based sanctions will be incentivized to invoke their inherent authority, even when the standards in the written rules are on point and resulted from well-considered deliberations. As discussed below, allegations of discovery violations have proven particularly vulnerable to manipulation and excessive sanctions, which can interfere with the ability of parties to achieve justice through the courts. Thus, for both legal and important public policy reasons, *amicus* respectfully urges the Court

to hold that a direct causation standard is needed when assessing inherent authority sanctions.

ARGUMENT

I. CAUSATION IS THE FOUNDATIONAL ELEMENT FOR DETERMINING COMPENSATORY DAMAGES

Under the "American Rule," each party to a lawsuit must pay his or her own fees and costs. *See Alyeska Pipeline Service Co., v. Wilderness Society*, 421 U.S. 240 (1975) (calling this obligation "deeply rooted in our history and in congressional policy"). There are rare exceptions for when courts can reallocate the burdens of litigation. In *Chambers*, the Court held that a judge has the inherent authority to order fee-shifting over pre-trial discovery when one of the parties, as alleged here, acts in "bad faith, vexatiously, wantonly, or for oppressive reasons." 501 U.S. at 45 (quoting *Alyeska*, 421 U.S. at 258-259). Once a court establishes a finding of bad faith, the question becomes what limitations exist for the scope of the sanctions imposed on that party.

In *Chambers*, the Court held that the amount of attorney's fees awarded can be only that which is needed to "make[] the prevailing party whole for expenses caused by his opponent's obstinacy." *Chambers*, 501 U.S. at 46 (quoting *Hutto v. Finney*, 437 U.S. 678, 689, n. 14 (1978)). So, while the decision to award sanctions is punitive in order to vindicate the court's authority over the recalcitrant litigant, the amount of the sanctions is purely compensatory. The punishment is paying costs that the litigant wrongly made another party incur from its malfeasance.

To give further guidance, the Court equated calculating compensatory damages under this inherent authority to the Court's jurisprudence for civil contempt sanctions. *See id.* at 53-54 (stating that awarding attorney's fees under inherent power sanctions is not distinguishable from "a fine for civil contempt, which also compensates a private party for the consequences of a contemnor's disobedience"). For contempt sanctions, the Court has been clear that a civil fine cannot exceed the amount needed to compensate the affected parties for specific "losses sustained" from the misconduct. *Int'l Union v. Bagwell*, 512 U.S. 821 (1994). In *Bagwell*, the Court explained that this delineation must remain firm because any amount of the sanction not directly compensatory is, by definition, criminal and invokes a higher level of due process. *Id.* at 829.[2]

Thus, when courts issue sanctions, under inherent or contempt authority, they are obligated to determine which damages directly resulted from the alleged misconduct. As discussed above, the District Court here admittedly did not take this needed step. Judge Watford underscored this point in his dissent, stating the record is "devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded." *Haeger*, 813 F.3d at 1255. The Court must require judges to establish this causal link.

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[2] In *Bagwell*, the Court found that a civil fine could also be levied if the recalcitrant litigant has an opportunity to avoid the fine through compliance, but that was not available in this case because the litigation had already settled. *See* 512 U.S. at 829.

A. Causation Is the Lynchpin for Compensatory Damages; It Ensures Compensation Is Tied to Losses

"But for" causation is the bedrock element for determining compensation, regardless of whether compensation is due from sanctions or substantive liability. "A fundamental premise of our legal system is the notion that damages are awarded to compensate the victim—to redress the injuries that he or she actually has suffered." *Smith v. Wade*, 461 U.S. 30, 57-58 (1983) (Rehnquist, J., dissenting) (citing D. Dobbs, Remedies § 3.1 (1973); C. McCormick, The Law of Damages 1 (1935)); *see also* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* § 41, 263 (5th ed. 1984) (requiring a "reasonable connection between the act or omission of the defendant and the damage" alleged); Fowler V. Harper *et al.*, *The Law of Torts* § 20.2 (1986) (The "common thread" for proximate cause is that "defendant's wrongful conduct must be a cause in fact of plaintiff's injury.").

Accordingly, the Court has applied "but for" causation for establishing compensatory damages across a wide-range of substantive areas of law. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346, 358 (2007) (stating "compensatory damages are measured by the harm the defendant has *caused* the plaintiff") (emphasis added); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 807 (2011) ("[I]nvestors must demonstrate that the defendant's deceptive conduct caused their claimed economic loss."); *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 443-44 (1997) (declining to recognize claim for medical monitoring under Federal Employers' Liability Act where employer did not cause a

physical injury); *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994) ("In order to recover compensatory damages . . . plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury.").

The Court should apply the same causation limitation on compensatory damages here. *See Chambers*, 501 U.S. at 60-61 (Kennedy, J., dissenting) (stating that a court's outrage at a given misconduct "should not obscure the boundaries of settled legal categories"). Causation has proven to be the necessary barometer for compensation. It provides a clear, fair, and predictable standard by ensuring that a sanction is tailored to the impact of the misconduct. Here, as the dissent explained, the District Court had several options for how it could have fashioned a remedy to compensate Plaintiff for the injuries incurred by Defendant's alleged discovery violation.

By contrast, removing causation from compensatory damages creates an anchorless ship: courts would have untethered authority to sanction parties. Many judges would undoubtedly show proper restraint in exercising this authority, but, as Justice Scalia warned in *Bagwell*, "[t]hat one and the same person would be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers." 512 U.S. at 840 (Scalia, J., concurring). "[E]ven the best-tempered judges can lose their impartiality when dealing with misconduct that they perceive as a personal attack." Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 765 (2001). As discussed further in Section II of this brief, these

dynamics can distort the scales of justice, particularly with alleged discovery violations.

Adhering to causation principles provides the rudder Justice Kennedy sought in *Chambers*, when he cautioned against creating an inherent authority to sanction "without specific definitional or procedural limits." 501 U.S. at 70 (Kennedy, J., dissenting). If a remedy is greater than compensation, as it clearly is here, it raises the "acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (discussing vagueness).[3] Parties subject to sanctions, even though they allegedly engaged in bad faith, are still entitled to be treated in a consistent and fair manner and to have their basic due process protections.

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[3] To avoid due process concerns with mixing compensatory and punitive damages, courts often bifurcate trials so that the proceedings on punitive damages are separate from proceedings on compensatory damages. *See* Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 946 (1989); James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 446 (1995).

Finally, the Court should not accept the District Court's declaration that it was "impossible" to separate the fees incurred by legitimate activity and those from Defendant's alleged refusal to abide by the discovery request. *Haeger*, 813 F.3d at 1247. As discussed above, courts regularly assess causal connections with respect to compensatory damages. "[N]either the likelihood of [injury] nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused." *Carey v. Piphus*, 435 U.S. 247, 264 (1978). District courts should not be alleviated of this foundational responsibility when levying sanctions under its inherent authority, including for discovery violations, as alleged here.

B. Unbounded Inherent Authority Can Undermine Well-Crafted Statutory and Rule-Based Sanctions

Requiring causation in determining sanctions for compensatory damages will also allay the other concern Justice Kennedy expressed in *Chambers*, namely that "a district court may disregard the requirements of otherwise applicable Rules and statutes and instead exercise inherent power to impose sanctions." 501 U.S. at 63 (Kennedy, J., dissenting). The Court allowed inherent authority sanctions "even if procedural rules exist which sanction the same conduct," *id.* at 49, and Justice Kennedy feared courts will treat inherent powers "as the norm and textual bases of authority as the exception." *Id.* at 63. Without proper standards and safeguards, determining the amount of inherent authority sanctions would be completely discretionary and, therefore, easier to impose and defend.

In an effort to assuage Justice Kennedy's concerns, the Court instructed judges that "inherent power must continue to exist to fill in the interstices" not reached by statutory and rule-based sanctions, but when there are other such rules, they "must, of course, exercise caution in invoking [their] inherent power." *Id.* at 46, 50. This statement reinforced earlier rulings on inherent power that it "must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). More recently, the Court appeared to go a step further, asserting that "an inherent power must be a reasonable response to a specific problem and the power cannot contradict any express rule or statute." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016).[4] Yet, the relationship between inherent powers and written sanctions is still murky, and as discussed in Section II below, Justice Kennedy's concerns have been realized in some instances.[5] Courts will continue to find inherent authority attractive if it provides them with

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[4] *See also Degen v. United States*, 517 U.S. 820, 827 (1996) ("A court's inherent power is limited by the necessity giving rise to its exercise."). Lower courts have adhered to these warnings. *See, e.g.*, *Tucker v. Williams*, 682 F.3d 654, 662 (7th Cir. 2012) (echoing that inherent power "is not a grant of authority to . . . undermine the American rule").

[5] This Court has also acknowledged that "there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen*, 517 U.S. at 823.

significant discretion and, accordingly, minimal appellate oversight.

This case, therefore, provides this Court with the opportunity to restore the balance sought in *Chambers*. Inherent power sanctions can still co-exist with written sanction authority, but by limiting the amount of the award to truly compensatory damages, it protects against creating a super-sanction, where courts can avoid the structure and restrictions of statutory and rule-based sanctions and do not have to fully justify the sanction amounts. *Cf. Bloom v. Illinois*, 391 U.S. 194, 207-08 (1968) ("[T]he unwisdom of vesting the judiciary with completely untrammeled power to punish contempt . . . makes clear the need for effective safeguards against the power's abuse."); *Bagwell*, 512 U.S. at 831 (finding judicial-based sanctions "uniquely . . . liable to abuse").

This Court should overturn the sanction here because it is not moored by causation and creates a penal fine without the required due process protections.

II. INHERENT AUTHORITY TO SANCTION DISCOVERY VIOLATIONS SHOULD BE WELL-DEFINED TO PREVENT SANCTION SHOPPING AND GAMESMANSHIP

The unbounded sanction authority Plaintiff seeks should also be viewed in the context of the decades-long concerns over the ability of parties to engage in improper discovery gamesmanship. The purpose of discovery, which is uniquely American, is to facilitate the search for truth. NAM views the fair and efficient functioning of the U.S. civil justice system to be a critical element of American global competitive-

ness. Too often in complex litigation, though, the costs and imperfections of discovery interfere with achieving justice in the courts. Not limiting damages to only those caused by the alleged malfeasance will worsen this problem by eroding confidence in the discovery process, undermining Federal Rule amendments to create greater certainty and fairness in discovery, and incentivizing discovery gamesmanship.

The manufacturing process, which includes developing, testing, and producing products, can be complex, time-consuming, and costly endeavors leading to enormous quantities of documents and electronic data. Discovery and corresponding retention obligations already are significant drivers of litigation costs, particularly for manufacturers. *See* The Third Branch: Newsletter of The Federal Courts, Vol. 31, No. 10 (Oct. 1999) ("Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used."). A NAM member company testified at a hearing on recent amendments to the Federal Rules that it spent twice as much on discovery in 2012 as it paid to claimants in settlements and judgments. *See* Linda Kelly, Comments on Proposed Amendments to the Federal Rules of Civil Procedure (USC-RULES-CV-2013-0002), Nat'l Assoc. of Manufacturers, at 3 (Feb. 14, 2013).[6]

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[6] Discovery costs have been "notoriously expensive and time-consuming" on small businesses as well. Tom O'Connor, *Cost-Effective e-Discovery for Small Cases*, ABA GP Solo (Jan./Feb. 2013); *cf.* Inst. for the Advancement of the of the Am. Legal Sys., Electronic Discovery: A View from the Front Lines 25

In some lawsuits, "[d]iscovery has now become the main event—the end game—in pretrial litigation proceedings." Hon. Patrick Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW (Summer 2004). It has been well-documented that the threat of a major discovery request can lead parties to settle rather than litigate, irrespective of a case's merits. In addition to costs, businesses are worried about unwarranted sanctions. "[T]he notion of having all information on a subject is almost unattainable." Report of the Advisory Committee on Civil Rules 4 (May 1998). Thus, regardless of how well one complies with discovery demands, there can be allegations that a page, document, or flash drive has not been produced. A violation appearing to a court to be in "bad faith," may actually be the result of mistake, misunderstanding, or the inability to adhere to voluminous or complex production orders. Discovery sanctions have become increasingly common. *See* Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 790-91 (2010) (examining the "significant increase" of e-discovery sanctions since 2004).

Giving parties access to windfall recoveries in excess of their corresponding attorney's fees and costs will incentivize more discovery disputes and lead to greater injustices. The inherent authority plaintiff seeks will make the problem worse, not better.

(2008) (reporting "e-discovery has penetrated even 'midsize' cases, potentially generating an average of $3.5 million in litigation costs for typical lawsuit").

A. Inherent Authority Sanctions Should Not Overtake the Recent Federal Rule Changes that Provide Greater Certainty for Sanctioning Discovery Violations

The Federal Rules recently underwent several modifications in an effort to curb the potential that discovery sanctions would distort litigation outcomes. These changes added important protections for manufacturers and other entities where preservation and production of documents can present complex undertakings. *See* Hon. John G. Koetl, From the Bench: Rulemaking, ABA Litigation, Vol. 41, No. 3 (Spring 2015) (explaining the changes provide needed "consistency and coherence" to the ways courts handle claims of failure to preserve and produce documents). These rules were the object of much discussion, generating more than 2,350 comments. *See* Proposed Amendments to the Federal Rules of Civil Procedure, *at* https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002. After lengthy consideration, the amendments took effect in December 2015.

Among the changes to the Federal Rules was to Rule 37(e), which authorizes and specifies measures a court may employ if certain information that should have been preserved is lost, and therefore not produced in discovery. *See* Fed. R. Civ. P. 37(e). The new Rule specifies the findings necessary to justify sanctions. It provides that a court can sanction a party for failing to preserve electronically stored information, including for the failure to take reasonable steps to preserve it, only when there is prejudice to another party, in which case the court "may order measures no greater than necessary to cure the prejudice," or "upon finding that the party acted with the

intent to deprive another party of the information's use in the litigation." *Id.*

Thus, the new Rule 37(e) developed the standards for when a court has sanction authority and, conversely, when a party is not to be subject to sanction. Whether the Court imposes needed restrictions on the inherent power to sanction in the case at bar could have a direct impact on the ability of the new Rule to achieve this balance. Rule 37(e) will be no more than a paper tiger if the inherent power sanction is left unchecked here.

The boundary between Rule 37 and inherent authority has already been subject to significant debate. The Committee Notes accompanying the Rule 37 change state that the new Rule is intended to "foreclose[] reliance on inherent authority" for when sanctions for failure to preserve this information can be levied and what those sanctions can be. Fed. R. Civ. P. 37 Advisory Comm. Note to 2015 Amendments. Yet, several courts have asserted the ability under *Chambers* to sanction shop between their inherent authority and the new Rule. *See, e.g., Cat3 v. Black Lineage*, 164 F. Supp. 3d 488, 498 (S.D.N.Y. 2016) ("Where exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue."); *Freidman v. Phila. Parking Auth.*, 2016 WL 6247470, at *8 (E.D. Pa. Mar. 10, 2016) ("[O]ur findings under Rule 37(e) do not end our analysis. . . . We are vested with broad discretion to fashion an appropriate remedy under our inherent powers."); *Internmatch v. Nxtbigthing*, 2016 WL 491483, at *4, n. 6 (N.D. Cal. Feb. 8, 2016) ("Whether a district court must now

make findings set forth in Rule 37 before exercising its inherent authority to impose sanctions . . . has not been decided.").

Properly restraining inherent authority sanctions here, therefore, can reduce the attractiveness of using it when Rule 37(e) or some other rule should govern. It can also send a message to lower courts that blatant sanction shopping is not encouraged. Otherwise, inherent authority sanctions will become the exception that swallows the Federal Rules.

B. Placing Causation Limits on Inherent Authority Sanctions Reduces Incentives to Litigate By Sanction

Placing a causation restraint on a judge's inherent authority to sanction a party is also needed to curb discovery gamesmanship, which manufacturers and other business regularly face in civil litigation. The high dollar stakes associated with discovery disputes has long created a significant incentive for litigants to aggressively pursue sanctions. *See, e.g.*, Retta A. Miller & Kimberly O'D. Thompson, *"Death Penalty" Sanctions: When to Get Them and How to Keep Them*, 46 BAYLOR L. REV. 737, 738 (1994) (finding "discovery 'gamesmanship' has become an integral part of litigation practice"); Charles Herring, Jr., *The Rise of the "Sanctions Tort,"* Tex. Law., Jan 28, 1991, at 22 (describing how lawyers engage in "outcome-determinative pretrial gamesmanship"). The opportunity for such gamesmanship is most acute when the discovery obligations in a case are lopsided, as with personal injury or so-called "patent troll" cases against product manufacturers.

As this Court has recognized, "many actions are extended unnecessarily by lawyers who exploit or abuse judicial procedures, especially the liberal rules for pretrial discovery." *Roadway Exp.*, 447 U.S. at 757 n.4. Over the decades, lawyers have developed techniques for setting discovery-related "traps" to trigger sanctions. *See, e.g.*, Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 FORDHAM L. REV. 959, 965 (1995) (explaining that instigating sanctions "is now a standard part of the modern litigation's play book"); Sherman Joyce, *The Emerging Business Threat of Civil 'Death Penalty' Sanctions*, 18:21 Legal Backgrounder (Wash. Legal Found. Sept. 10, 2009), at 1 ("personal injury attorneys have begun using [sanctions] as just another litigation tactic against civil defendants"); Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, Litigation, Vol. 36, No. 2 (Winter 2010) (providing tips for sanctions motions).

For example, some lawyers intentionally provoke disputes by "seek[ing] impossibly broad discovery or, alternatively, discovery of the same information from multiple sources" and move for sanctions "when mistakes are inevitably uncovered." *A Prescription for Stronger Discovery Medicine: The Danger of Tinkering Change and the Need for Meaningful Action*, Lawyers for Civil Justice, at 5 (Aug. 2011). They try to create the perception of bad faith by inundating courts "with motions to compel additional discovery and motions for sanctions based upon speculation that responsive material is being withheld with nefarious intent." *Id.* They also may seek "discovery on discovery" by challenging the process a manufacturer

or other business uses for responding to discovery requests, rather than the results of that process.[7]

In these scenarios, the lawyer's goal is to stoke a judge's anger at the opposing party, accuse the other party of intentionally obstructing justice, and then seek broad sanctions. They know, as this Court has expressed, that "[c]ontumacy often strikes at the most vulnerable and human qualities of a judge's temperament." *Bagwell*, 512 U.S. at 831; *see also* Pushaw, 86 IOWA L. REV. at 738 (observing that "sanctions sometimes reflect [judges'] personal pique"). This practice has been termed "litigation by sanction" or the "sanction tort," because by "racking up enough sanctions during discovery, the merits of the case might never be reach at all." Nathan L. Hecht, *Discovery Lite! – The Consensus for Reform*, 15 REV. LITIG. 267, 270 (1996). Windfall sanctions, not liability, create funds for them and their clients.

The combination of litigants' discovery gamesmanship and courts' potentially unchecked inherent sanctioning authority creates an almost standardless legal environment. Requiring a causal connection between discovery misconduct and the assessment of attorney's fees as a compensatory discovery sanction may not prevent all discovery abuse, but it provides an important check on a judge's inherent authority and can reduce the incentives to orchestrate purported discovery violations.

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[7] The recent Fed. R. Civ. P. Committee Notes counsel against unwarranted "discovery on discovery" but, as with the exclusivity of Rule 37 sanctions, adherence to this Note remains in question.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court reverse the Ninth Circuit, vacate the award of attorney's fees, and remand with instructions to apply a direct causation standard for inherent authority sanctions.

Respectfully submitted,

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